

969/023

TENTATIVE DRAFT

of

PORTIONS OF

NEW DIVISION 2 (GENERAL NONPROFIT CORPORATION LAW)

AND

NEW DIVISION 4 (PROVISIONS APPLICABLE TO CORPORATIONS GENERALLY)

Revised June 12, 1976

CALIFORNIA LAW REVISION COMMISSION
STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94305

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404/103

§ 5000

Tentatively Approved
January 1976

DIVISION 2. GENERAL NONPROFIT CORPORATION LAW

CHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS

Article 1. General Provisions

§ 5000. Short title

5000. This division shall be known and may be cited as the General Nonprofit Corporation Law.

Comment. Section 5000 continues former Section 9000. For a comparable provision, see Section 100(a)(General Corporation Law).

404/396

§ 5101

Tentatively Approved
January 1976

§ 5101. Application of general provisions

5101. Unless the provision or the context otherwise requires, the provisions of this chapter govern the construction of this division.

Comment. Section 5101 is the same in substance as Sections 5 (Corporations Code) and 101 (General Corporation Law). Unless otherwise provided in this division, the general provisions and definitions found among the general provisions of the Corporations Code are applicable. See, e.g., Sections 6-18.

Substance Tentatively
Approved January 1976

§ 5102. Scope of division

5102. (a) Subject to the provisions of Chapter 23 (transition provisions), the provisions of this division apply to every nonprofit corporation now existing or hereafter formed unless:

(1) The nonprofit corporation is expressly exempted from the operation thereof.

(2) There is a special provision applicable to the nonprofit corporation inconsistent with the provisions of this division, in which case the special provision prevails.

(b) The existence of nonprofit corporations formed or existing on the date of the enactment of this division shall not be affected by the enactment of this division nor by any change in the requirements for the formation of nonprofit corporations nor by the amendment or repeal of the laws under which they were formed or created.

(c) Neither the repeals effected by the enactment of this division nor the enactment of this title nor the amendment thereof shall impair or take away any existing liability or cause of action against any nonprofit corporation, its members, directors, or officers incurred prior to the time of such enactment or amendment.

(d) The provisions of Division 1 (commencing with Section 100) do not apply to nonprofit corporations.

Comment. Subdivision (a) of Section 5102 continues former Section 9001. For express exemptions from the operation of the General Nonprofit Corporation Law, see [to be supplied]. For special provisions

applicable to nonprofit corporations that are inconsistent with the General Nonprofit Corporation Law, see [to be supplied]. Special provisions relating to nonprofit corporations in this or other codes that are not expressly repealed remain in effect.

Subdivisions (b) and (c) are the same in substance as subdivisions (b) and (c) of Section 102 (General Corporation Law).

Subdivision (d) supersedes former Section 9002. Unlike former law, the new General Nonprofit Corporation Law provides a complete set of rules governing nonprofit corporations and does not incorporate by reference nor is it governed in any way by the General Corporation Law. It should be noted, however, that court decisions under comparable provisions of the General Corporation Law, to the extent they concern problems common to business and nonprofit corporations, may be useful in construing the provisions of the General Nonprofit Corporation Law.

Note. With each change in the law that the new General Nonprofit Corporation Law makes, the Commission must consider its effect on existing corporations and whether compliance is required. This section and Section 5172.5 ("nonprofit corporation" defined) are related.

The staff is at present researching the special provisions and exemptions for nonprofit corporations.

Provisions relating to the application of this division to foreign nonprofit corporations and to business corporations are being drafted. The interrelation of this division with Division 4 is being studied.

968/696

§ 5113

Tentatively Approved
April 1976

§ 5113. Mailing

5113. (a) Any reference in this division to mailing means first-class mail, postage prepaid, unless registered mail is specified.

(b) Registered mail includes certified mail.

Comment. Section 5113 is the same as Section 113 (General Corporation Law).

Note. The staff is to check the entire statute to determine whether certified mail should be used in cases where registered mail is specified. Is a receipt showing date of mailing available if certified mail is used? It should be noted that Section 3 of the Corporations Code provides that registered mail includes certified mail.

968/702

§ 5114

Tentatively Approved
April 1976

§ 5114. Financial statements to be prepared in accordance with generally accepted accounting principles

5114. All references in this division to financial statements, balance sheets, statements of assets and liabilities, and statements of principal changes in assets and liabilities of a nonprofit corporation and all references to assets, liabilities, revenue, receipts, expenses, disbursements, and similar accounting items of a nonprofit corporation mean such financial statements or such items prepared or determined in accordance with generally accepted accounting principles then applicable, and fairly presenting the matters which they purport to present,

subject to any specific accounting treatment required by a particular section of this division.

Comment. Section 5114 is the same in substance as Section 114 (General Corporation Law) with revisions to reflect the terminology used in this division with respect to the financial matters of nonprofit corporations. The portion of Section 114 relating to consolidated statements where the corporation has subsidiaries has been omitted in Section 5114. See, e.g., Section 6521.

968/703

§ 5115

Tentatively Approved
April 1976

§ 5115. Independent accountant

5115. As used in this division, independent accountant means a certified public accountant or public accountant who is independent of the nonprofit corporation as determined in accordance with generally accepted auditing standards and who is engaged by the nonprofit corporation to audit its financial statements or perform other accounting services.

Comment. Section 5115 is the same in substance as Section 115 (General Corporation Law).

Tentatively Approved
April 1976

Article 2. Definitions

§ 5149. Acknowledged

5149. (a) "Acknowledged" means that an instrument is either:

(1) Formally acknowledged as provided in Article 3 (commencing with Section 1180) of Chapter 4 of Title 4 of Part 4 of Division 2 of the Civil Code; or

(2) Accompanied by a declaration in writing signed by the persons executing the instrument that they are such persons and that the instrument is the act and deed of the persons executing it.

(b) A certificate of acknowledgment taken without this state before a notary public or a judge or clerk of a court of record having an official seal need not be further authenticated.

Comment. Section 5149 is the same in substance as Section 149 (General Corporation Law).

Note. Section 5149 includes the substance of the amendments proposed by Assembly Bill 2849. The staff is to determine the necessity of the words "certificate of" in the last paragraph of the section.

Tentatively Approved
March 1976

§ 5151. Approved by (or approval of) the board

5151. "Approved by (or approval of) the board" means approved or ratified by the vote of the board.

Comment. Section 5151 is the same in substance as Section 151 (General Corporation Law). The vote required for approval of the board is [to be supplied]. The phrase defined in this section is used in the following provisions:

§ 5922 (adoption of amendments by board and members)

§ 5923 (adoption of amendments by board alone)

§ 5942 (approvals required for restated articles)

Note. Whether approval of the board should include approval by authorized committees is deferred until consideration of directors and committees. Likewise, the provisions for the vote of directors will be drafted at that time.

Whether it is appropriate to use the word "vote," which is a defined term, will be determined later.

969/018

§ 5154

Tentatively Approved
January 1976

§ 5154. Articles

5154. "Articles" includes the articles of incorporation, amendments thereto, amended articles, and restated articles.

Comment. Section 5154 is the same in substance as Section 154 (General Corporation Law). It continues former Section 102, which was applicable to nonprofit corporations through former Section 9002.

Note. The question whether this section should include certificates of incorporation and agreements of merger is deferred.

404/381

§ 5156

Tentatively Approved
March 1976

§ 5156. Business corporation

5156. "Business corporation" means a corporation organized under Division 1 (commencing with Section 100) of Title 1 or a business corporation organized under any predecessor general corporation law or by any act of the Legislature creating a private corporation prior to the enactment of a general incorporation statute.

Comment. Section 5156 adopts the definition of "corporation" found in Section 162 (General Corporation Law).

Note. Consideration will be given to expanding this definition to all corporations other than nonprofit. The revisions of the definition of corporation in Section 162 by the cleanup bill will be studied.

968/706

§ 5167

Tentatively Approved
April 1976

§ 5167. Domestic nonprofit corporation

5167. "Domestic nonprofit corporation" means a nonprofit corporation formed under the laws of this state.

Comment. Section 5167 is the same in substance as Section 167 (General Corporation Law).

Note. Whether this definition is appropriately used should be checked for each place it is used in the statute. Also, is the definition intended to cover corporations heretofore or hereafter formed?

968/624

§ 5169

Tentatively Approved
February 1976

§ 5169. Filed

5169. "Filed," unless otherwise expressly provided, means filed in the office of the Secretary of State.

Comment. Section 5169 is the same in substance as Section 169 (General Corporation Law).

Note. The staff has not yet determined whether the proviso of this section is necessary.

§ 5172.5. Nonprofit corporation

5172.5. "Nonprofit corporation" means a corporation organized under this division or under any predecessor general or special nonprofit corporation law, or by any act of the Legislature creating a private nonprofit corporation prior to the enactment of a general nonprofit incorporation statute.

Comment. Section 5172.5 is new; for a comparable definition of "corporation," see Section 162 (General Corporation Law).

Note. The staff has not yet investigated the extent to which the new statute can or should be applied to preexisting nonprofit corporations or to foreign nonprofit corporations. This section and Section 5111 (scope of division) are related.

The staff has not yet investigated whether any nonprofit corporations created by act of Legislature prior to enactment of a general law do exist. The change in comparable Section 162 by the cleanup bill will be studied.

Tentatively Approved
March 1976

§ 5173. Officers' certificate

5173. "Officers' certificate" means a certificate signed and verified by both of the following officers:

- (a) The chairman of the board, the president, or any vice president.
- (b) The secretary, the chief financial officer, the treasurer, or any assistant secretary or assistant treasurer.

Comment. Section 5173 is the same in substance as Section 173 (General Corporation Law). The requirements for verification may be found in Section 5193. The phrase defined in this section is used in the following provisions:

§ 5931 (contents of certificate of amendment)

§ 5940 (restated articles)

968/707

§ 5177

Tentatively Approved
April 1976

§ 5177. Proper county

5177. "Proper county" means:

(a) The county where the principal executive office of the non-profit corporation is located.

(b) If the principal executive office of the nonprofit corporation is not located in this state, or the nonprofit corporation has no such office, the County of Sacramento.

Comment. Section 5177 is the same in substance as Section 177 (General Corporation Law).

Tentatively Approved
March 1976

§ 5179. Proxy

5179. (a) "Proxy" means a written authorization signed by a member or the member's attorney in fact giving another person or persons power to vote with respect to the membership of the member.

(b) "Signed" for the purpose of this section means the placing of the member's name on the proxy (whether by manual signature, typewriting, telegraphic transmission, or otherwise) by the member or the member's attorney in fact.

Comment. Section 5179 is the same in substance as Section 179 (General Corporation Law). For provisions relating to proxies, see Sections 5640 (form of proxy), 5263 (bylaws relating to voting rights), and 5705 (proxies).

Tentatively Approved
March 1976

§ 5193. Verified

5193. (a) "Verified" means that the statement contained in a certificate or other document is declared to be true of the own knowledge of the person executing it by either of the following means:

(1) An affidavit signed under oath before an officer authorized to administer oaths by the laws of this state or of the place where it is executed.

(2) A declaration in writing executed "under penalty of perjury" that states the date and place of execution (whether within or without this state).

(b) Any affidavit sworn to without this state before a notary public or a judge or clerk of a court of record having an official seal need not be further authenticated.

Comment. Section 5193 is the same in substance as Section 193 (General Corporation Law). The term defined in this section is used in the following provisions:

§ 5052 (execution of certificate of correction)

§ 5173 (officers' certificate)

Note. The staff has under study the extent to which "certificate or other document" differs from "instrument."

404/383

§ 5194

Not Approved; See Minutes
March 1976

§ 5194. Vote

5194. "Vote" includes authorization by written consent.

Comment. Section 5194 is comparable to Section 194 (General Corporation Law).

Note. Section 194 is subject to Sections 307(f) and 603(d); the staff has not yet examined these provisions.

This section must be reviewed in the light of its potential application to voting by directors and voting by a policymaking committee of members.

Not Approved; See Minutes
April 1976

§ 5195. Written or in writing

5195. "Written" or "in writing" includes facsimile and telegraphic communication.

Comment. Section 5195 is the same as Section 195 (General Corporation Law). It should be noted that a writing must be in English and comprehensible by ordinary visual means. Section 8.

Note. The Commission requested that "writing" include something similar to Section 8.

Tentatively Approved
February 1976

CHAPTER 2. ORGANIZATION AND BYLAWS

Article 1. Purposes

§ 5210. Any lawful purpose other than distribution of dividends

5210. Subject to the laws and regulations applicable to the particular class of nonprofit corporation or line of activity, a nonprofit corporation may be formed for any lawful purposes other than the distribution of gains, profits, or dividends to members.

Comment. Section 5210 continues the substance of a portion of the first sentence of former Section 9200. Section 5210 permits incorporation for such purposes as religious, charitable, social, educational, cemetery, or for rendering services, but does not limit incorporation to these purposes. The requirement of former Section 9200 that the corporate purposes be ones for which individuals lawfully may associate themselves is not continued; it is unnecessary in light of the general limitation of Section 5210 that the nonprofit corporation be formed only for lawful purposes.

The articles of a nonprofit corporation must preclude distribution of the proceeds of its operations to members except to the extent provided in this division. See Section 5250. It should be noted, however, that this section does not prohibit a nonprofit corporation from operating a business or from making profits thereon. See Section 5235(a) (power to engage in business activity). Any profits must be applied to the lawful corporate purposes (Section 5235(b)) and may not be distributed to members except to the extent permitted by Section 5236. Violation of this section may subject the nonprofit corporation or its directors to the following sanctions: [to be supplied].

The introductory portion of Section 5210 recognizes that there may be limitations on the purposes for which particular types of nonprofit

corporations may be formed. See, e.g., Sections 5211 (medical services corporations) and 5212 (legal services corporations). It should also be noted that a nonprofit corporation may be formed, subject to Section 5210, for the purpose of incorporating an unincorporated association (Section 5213) or subordinate body (Section 5214).

043/172

§ 5211

Tentatively Approved
February 1976

§ 5211. Medical services corporation

5211. (a) A nonprofit corporation may be formed under this division for the purpose of defraying or assuming the cost of professional services of licentiates under any chapter of Division 2 (commencing with Section 500) of the Business and Professions Code or of rendering any such services, but it may not engage directly or indirectly in the performance of the corporate purposes or objects unless all of the following requirements are met:

(1) At least one-fourth of all licentiates of the particular profession residing in California become members.

(2) Membership in the nonprofit corporation and an opportunity to render professional services upon a uniform basis are available to all licensed members of the particular profession or, in the case of refractions or eye appliances, to all licentiates expressly authorized by law to render such services.

(3) Voting by proxy and cumulative voting are prohibited.

(4) A certificate is issued to the nonprofit corporation by the particular professional board whose licentiates have become members, finding compliance with the requirements of subdivisions (1), (2), and (3).

(b) Any such nonprofit corporation shall be subject to supervision by the particular professional board under which its members are licensed and shall also be subject to Section [9505] of the Corporations Code.

Comment. Section 5211 continues former Corporations Code Sections 9201 and 9201.1.

Note. A new section number has yet to be assigned to Corporations Code Section 9505 (property subject to supervision by Attorney General).

043/171

§ 5212

Tentatively Approved
February 1976

§ 5212. Legal services corporation

5212. (a) Nonprofit corporations may be formed under this division for the purpose of administering a system or systems of defraying the cost of professional services of attorneys, but the nonprofit corporation may not engage directly or indirectly in the performance of the corporate purposes or objects unless all of the following requirements are met:

(1) The attorneys furnishing professional services pursuant to such system or systems are acting in compliance with the Rules of Profes-

sional Conduct of the State Bar of California concerning such system or systems.

(2) Membership in the nonprofit corporation and an opportunity to render professional services upon a uniform basis are available to all active members of the State Bar of California.

(3) Voting by proxy and cumulative voting are prohibited.

(4) A certificate is issued to the nonprofit corporation by the State Bar of California finding compliance with the requirements of subdivisions (1), (2), and (3).

(b) Any such nonprofit corporation shall be subject to supervision by the State Bar of California and shall also be subject to Section [9505] of the Corporations Code.

Comment. Section 5212 continues former Corporations Code Section 9201.2.

Note. A new section number has yet to be assigned to Corporations Code Section 9505 (property subject to supervision by Attorney General).

999/552

Tentatively Approved
February 1976

§ 5213. Incorporation of unincorporated association

5213. (a) A corporation may be formed under this division, subject to the requirements of this section, for the purpose of incorporating an existing unincorporated association or

organization. As used in this section, "unincorporated association" includes but is not limited to society, library, school, college, club, church, trustees of a charitable trust, and chamber of commerce.

(b) The articles of incorporation shall set forth the name of the existing unincorporated association.

(c) The articles of incorporation shall be subscribed by the presiding officer or acting presiding officer and the secretary or clerk or similar officer of the association or by at least a majority of its governing board or body, and there shall be attached thereto the affidavit of the subscribing officers, board, or body that the association has duly authorized its incorporation and has authorized the officers, board, or body to execute the articles of incorporation.

(d) The members of the association shall be members of the non-profit corporation so created unless they file their dissent in writing with the secretary thereof.

Comment. Subdivision (a) of Section 5213 continues former Section 9202; subdivision (a) is subject to Section 5210 (proper corporate purposes). Subdivision (b) continues subdivision (f) of former Section 9300; subdivision (b) is in addition to the requirements of Section 5250 (required contents of articles). Subdivision (c) continues subdivision (b) of former Section 9304, with the exception of the acknowledgment requirement, which is omitted as unnecessary; subdivision (c) is an exception to the provisions of Section 5221 (execution of articles). Subdivision (d) continues former Section 9604.

Note. The staff has not yet devised an appraisal remedy for dissenting members of an unincorporated association.

Tentatively Approved
February, 1976

§ 5214. Incorporation of subordinate body

5214. (a) A corporation may be formed under this division, subject to the requirements of this section, for the purpose of incorporating a subordinate body instituted or created under the authority of a head or national association, lodge, order, beneficial association, fraternal or beneficial society, labor union, foundation, federation, or any other society, organization, or association. The fact that the head or national body is unincorporated does not prevent the incorporation of the subordinate body.

(b) The rules governing the incorporation and operation of unincorporated associations govern the incorporation of a subordinate body.

(c) The seal of the subordinate body shall be its corporate seal.

(d) Whenever the charter of a subordinate body incorporated pursuant to this section is surrendered to, taken away, or revoked by the head or national body granting it, the subordinate body shall dissolve.

After paying its debts and obligations or making adequate provision therefor, the subordinate body may collect obligations owed to it and may sell property which is not designed for the exclusive use of the organization. Notwithstanding Article 3 (commencing with Section 7030) of Chapter 20, the subordinate body shall then deliver any remaining property or obligations owed to it and any remaining proceeds of the sale of property to the head or national body to be disposed of in accordance with the laws of the head or national body.

Comment. Subdivisions (a)-(c) of Section 5214 continue former Section 9203; for the rules governing incorporation of unincorporated associations, see Section 5213. Subdivision (d) continues former Section 9802; it is an exception to the provisions of Sections 7030-7037 (distribution of assets on dissolution of nonprofit corporation). The Commission invites comments concerning this subdivision.

Note. The staff has not yet collected for the Comment cases relating to subdivision (d).

The provision relating to corporate seal will be reviewed in the light of other provisions relating to corporate seals.

968/618

§ 5220

Tentatively Approved
February 1976

Article 2. Formation

§ 5220. Nonprofit corporation formed by executing and filing articles

5220. A nonprofit corporation may be formed under this division by executing and filing articles of incorporation.

Comment. Section 5220 supersedes a portion of former Section 9200 which provided that a nonprofit corporation may be formed by three or more persons. Section 5220 deletes the concept of incorporators, who perform no necessary function. One or more initial directors execute and file the articles and are fully empowered to govern the affairs of the nonprofit corporation until the selection of their successors. See Sections 5221 (execution of articles) and 5250 (required contents of articles). For a comparable provision, see Section 200(a) (General Corporation Law).

968/617

§ 5221

Tentatively Approved
February 1976

§ 5221. Execution of articles

5221. One or more persons named in the articles of incorporation to act in the capacity of an initial director shall execute the articles by personally signing the articles.

Comment. Section 5221 supersedes former Section 9304(a). Under Section 5221, "other persons desiring to associate with" the first directors are no longer permitted to sign the articles. Section 5221

also eliminates the acknowledgment requirements of former Section 9304(a) since they served no useful purpose. For an exception to the provision of Section 5221, see Sections 5213 (incorporation of unincorporated association) and 5214 (incorporation of subordinate body). For a comparable provision, see Section 200(b) (General Corporation Law).

043/187

§ 5222

Tentatively Approved
February 1976

§ 5222. Filing of articles

5222. The corporate existence begins upon the filing of the articles and continues perpetually unless otherwise expressly provided in the articles.

Comment. Section 5222 is the same in substance as Section 200(c) (General Corporation Law) except that the exception for other laws is not continued because it is inapplicable to nonprofit corporations. Section 5222 supersedes former Section 9304.5. It eliminates the requirement that articles be filed with the county clerk of the county in which the nonprofit corporation is to have its principal office. See Section 5169 ("filed" means filed with Secretary of State). For the duty of the Secretary of State to file and endorse the date of filing on the articles, see Section 5115.

Section 5222, unlike former Section 9304.5, authorizes the nonprofit corporation to limit in the articles the term of its existence. See also Section 5251(b)(1) (permitted contents of articles).

Tentatively Approved
February 1976

§ 5223. Evidence of corporate formation and existence

5223. For all purposes other than an action in the nature of quo warranto, a copy of the articles of a nonprofit corporation duly certified by the Secretary of State is conclusive evidence of the formation of the corporation and prima facie evidence of its corporate existence.

Comment. Section 5223 is the same in substance as Section 209 (General Corporation Law). It continues former Section 313, which was applicable to nonprofit corporations through former Section 9002. See, e.g., Barber v. Irving, 226 Cal. App.2d 560, 38 Cal. Rptr. 142 (1964); see also Cavin Memorial Corp. v. Requa, 5 Cal. App.3d 345, 85 Cal. Rptr. 107 (1970). For an action in the nature of quo warranto, see Section 803 of the Code of Civil Procedure.

Note. The staff has not yet researched or included in the Comment material relating to the interrelation of this section with the alter ego doctrine.

404/104

§ 5224

Substance Tentatively
Approved February 1976

§ 5224. Additional requirement for charitable corporations

5224. Promptly upon formation, a nonprofit corporation organized for charitable purposes shall send a copy of its articles to the Attorney General.

Comment. Section 5224 is new. It is designed to assist the Attorney General in his supervisory duties under the Uniform Supervision of Trustees for Charitable Purposes Act.

Not Approved; See Minutes
February 1976

Article 3. Powers

§ 5230. Powers of nonprofit corporation

5230. Subject to any limitation provided by statute or in its articles, a nonprofit corporation has the following powers which may be exercised only in furtherance of its corporate purposes:

(a) Adopt, use, and at will alter a corporate seal, but failure to affix a seal does not affect the validity of any instrument.

(b) Adopt, amend, and repeal bylaws.

(c) Conduct its affairs, including engaging in business, within and without this state and qualify to conduct its affairs in any other state, territory, dependency, or foreign country.

(d) Appoint such subordinate officers, employees, or other agents as the activities of the nonprofit corporation may require and allow them reasonable compensation for services rendered.

(e) Sue and be sued.

(f) Make contracts.

(g) Receive property by devise or bequest and otherwise acquire and hold any real or personal property including shares of stock, bonds, and securities of other corporations and nonprofit corporations.

(h) Act as trustee under any trust incidental to the principal purposes of the nonprofit corporation and receive, hold, administer, and expend funds and property subject to such trust.

(i) Convey, exchange, lease as lessor, mortgage, encumber, transfer upon trust, or otherwise dispose of any real or personal property.

(j) Borrow money, contract debts, and issue bonds, notes, and debentures, and secure the payment or performance of its obligations.

(k) Make charitable contributions.

(l) Participate with others in any partnership, joint venture, or other association, transaction, or arrangement of any kind which the nonprofit corporation would have power to conduct itself, whether or not such participation involves sharing or delegation of control with or to others.

(m) Do all other acts necessary or expedient for the administration of the affairs and attainment of the purposes of the nonprofit corporation.

Comment. Section 5230 empowers a nonprofit corporation to engage in a wide range of activities in furtherance of its corporate purposes. However, as provided by the introductory clause, the listed powers may be subject to limitations provided by other statutes or the nonprofit corporation may restrict the statutory powers available by a provision in its articles. See Sections 5250(b) and 5252(b). Section 5230 does not substantially alter prior law applicable to nonprofit corporations. See former Section 9501. However, for clarity, several powers which would have been included within the general grant of authority of subdivision (h) of former Section 9501 are listed in this section.

Subdivisions (a) and (b) are the same as subdivisions (a) and (b), respectively, of Section 207 (General Corporation Law). Subdivision (c) is derived from subdivision (e) of former Section 801 (former General Corporation Law) and subdivision (c) of Section 207 (General Corporation Law). Subdivision (d) is based on subdivision (d) of former Section 801 (former General Corporation Law).

Subdivisions (e), (f), (g), (h), (i), and (j) are nearly identical to subdivisions (a), (b), (c), (d), (e), and (f), respectively, of former Section 9501 (former General Nonprofit Corporation Law). It

should be noted that subdivision (h), empowering the nonprofit corporation to act as a trustee, does not excuse compliance with other laws regulating trustees. The language of subdivision (c) of former Section 9501 to the effect that the nonprofit corporation could receive property by devise or bequest "subject to the laws regulating the transfer of property by will" has been omitted from subdivision (g) of Section 5230 because it is superfluous in light of the introductory provision.

Subdivision (k) is derived from subdivision (g) of former Section 302 (former General Corporation Law). Subdivision (l) is based on subdivision (h) of Section 207 (General Corporation Law) but provides a limitation derived from Section 7502(a)(11) of the Pennsylvania Corporation Not-for-profit Code to the effect that the nonprofit corporation may participate in partnerships and the like only when the nonprofit corporation would have power to conduct such activities itself.

Subdivision (m) is identical to subdivision (h) of former Section 9501 (General Nonprofit Corporation Law).

Note. This section is to be substantially revised in accordance with Commission decisions at the February 1976 meeting.

045/197

§ 5231

Substance Tentatively
Approved February 1976

§ 5231. Defense of ultra vires

5231. (a) No limitation upon the activities, purposes, or powers of the nonprofit corporation or upon the powers of the members, officers, or directors, or the manner of exercise of such powers, contained in or implied by the articles or by Chapters 18, 19, and 20 shall be asserted as between the nonprofit corporation or member and any

third person, except in a proceeding (1) by a member or the state to enjoin the doing or continuation of unauthorized activities by the nonprofit corporation or its officers, or both, in cases where third parties have not acquired rights thereby; (2) to dissolve the nonprofit corporation, or (3) by the nonprofit corporation or by a member suing in a representative suit against the officers or directors of the nonprofit corporation for violation of their authority.

(b) Any contract or conveyance made in the name of a nonprofit corporation which is authorized or ratified by the board, or is done within the scope of authority, actual or apparent, conferred by the board or within the agency power of the officer executing it, except as the board's authority is limited by law other than this division, binds the nonprofit corporation, and the nonprofit corporation acquires rights thereunder whether the contract is executed or wholly or in part executory.

(c) This section applies to contracts and conveyances made or to be performed by foreign nonprofit corporations in this state and to all conveyances by foreign nonprofit corporations of real property situated in this state.

Comment. Section 5231 is the same in substance as Section 208 (General Corporation Law). It continues provisions of former Section 803 which were applicable to nonprofit corporations through former Section 9002. See, e.g., Osteopathic Physicians & Surgeons v. California Medical Ass'n, 224 Cal. App.2d 378, 36 Cal. Rptr. 641 (1964). For an exception to Section 5231, see Section 5232 (enjoining ultra vires act of charitable corporation).

Note. The staff has not yet:

(1) Drafted provisions relating to dissolution or to foreign nonprofit corporations.

(2) Researched whether the board's authority is limited by law outside the General Nonprofit Corporation Law.

(3) Revised subdivision (a) for clarity or researched the meaning of "the state" and "where third parties have acquired rights thereby."

045/193

§ 5232

Tentatively Approved
February 1976

§ 5232. Enjoining ultra vires act of nonprofit corporation holding assets on charitable trust

5232. (a) Notwithstanding Section 5231, in the case of a nonprofit corporation that holds its assets on a charitable trust or is organized for a charitable purpose, a limitation described in subdivision (a) of Section 5231 may be asserted in an action to enjoin the doing or continuation of unauthorized activities by the nonprofit corporation or its officers, or both, regardless of whether third parties have acquired rights thereby.

(b) In an action under this section, the court may enjoin the performance of a contract if all the parties to the contract are parties to the action and if it is equitable to do so.

Comment. Section 5232 is new; for a comparable provision, see ALL-ABA Model Nonprofit Corporation Act § 6(a). See also Holt v. College of Osteopathic Physicians & Surgeons, 61 Cal.2d 750, 40 Cal. Rptr. 244, 394 P.2d 932 (1964) (minority trustees of charitable corporation may seek to

enjoin unauthorized corporate activity). Section 5232 establishes an exception to the limitations on use of the ultra vires doctrine found in Section 5231.

404/108

§ 5235

Tentatively Approved
February 1976

§ 5235. Power to engage in business activity

5235. (a) Subject to any limitations contained in the articles and applicable laws, a nonprofit corporation may engage in business activity.

(b) Any gain or profit that results from business activity of a nonprofit corporation shall be applied only to lawful activities in furtherance of or incidental to the purposes for which the nonprofit corporation is formed.

Comment. Section 5235 is new.

Subdivision (a) supersedes the portion of the second sentence of former Section 9200 which provided that "carrying on business at a profit as an incident to the main purposes of the corporation" is not forbidden. Subdivision (a) makes clear that a corporation may carry on a business for profit whether or not the business is "incident" to its main purposes. See People ex rel. Groman v. Sinai Temple, 20 Cal. App.3d 614, 99 Cal. Rptr. 603 (1971). For a comparable provision, see Section 206 (General Corporation Law). One major limitation on the business activity of nonprofit corporations is found in subdivision (b).

Subdivision (b) requires that any gains or profits of the business be applied to the purposes of the nonprofit corporation. It should be

noted that a nonprofit corporation may not have as a purpose the distribution of gains, profits, or dividends to members. Section 5210. Nor may a nonprofit corporation distribute any such gains, profits, or dividends to members. Section 5236. Violation of this section may subject the nonprofit corporation or its directors to the following sanctions: [to be supplied].

404/120

§ 5236

Tentatively Approved
February 1976

Staff Revision May 1976

§ 5236. Distributions to members prohibited

5236. (a) A nonprofit corporation shall not distribute any gains, profits, or dividends to members.

(b) Notwithstanding subdivision (a), a nonprofit corporation may, subject to any limitations in the bylaws, do any of the following, none of which shall be deemed to be a distribution of gains, profits, or dividends:

- (1) Pay compensation to members for services rendered.
- (2) Confer benefits upon members in conformity with the purposes for which it is formed.
- (3) Make distributions to members upon dissolution or winding up to the extent permitted by this division.
- (4) Make any payments to members authorized by Chapter 5 (commencing with Section 5500).

Comment. Section 5236 is new; for a comparable provision, see the last portion of Section 26 of the ALI-ABA Model Non-Profit Corporation Act.

Subdivision (a) continues a limitation formerly found in the second sentence of Section 9200. A nonprofit corporation may not be formed for profit-distribution purposes (Section 5210), and this limitation must be stated in the articles. Section 5250. While subdivision (a) continues the limitation of former law that profits, gains, or dividends may not be distributed, this limitation is subject to the provisions of subdivision (b). Violation of this provision may subject the nonprofit corporation or its directors to the following sanctions: [to be supplied].

Subdivision (b) lists major areas of withdrawal of corporate proceeds which do not violate the prohibition of subdivision (a). Paragraph (1) is new; compensation may be limited or precluded in the articles or bylaws. Paragraph (2) supersedes the portion of former Section 9200 permitting the formation of a nonprofit corporation for the purpose of rendering services. It makes clear that a nonprofit corporation may provide benefits to its members without violating the prohibition against distributions of gains, profits, or dividends as such. This codifies case law. People ex rel. Groman v. Sinai Temple, 20 Cal. App.3d 614, 99 Cal. Rptr. 603 (1971) (discount on price of cemetery land to members of nonprofit corporation is proper). Paragraph (3) continues portions of former Section 9200 permitting distributions on dissolution. For limitations on such distributions, see Sections 7030-7037. Paragraph (4) makes clear that the nonprofit corporation may repay debts owed to members and purchase or redeem other corporate instruments held by members to the extent permitted in Sections 5500-5577 (corporate finance), without violating subdivision (a). See also Sections 5532 and 5550.

Note. The portions of this section relating to paragraph (4) have been added by the staff and have not been reviewed by the Commission.

Substance Tentatively
Approved February 1976

Article 5. Articles of Incorporation

§ 5250. Required contents of articles

5250. The articles shall set forth:

(a) The name of the nonprofit corporation.

(b) That the nonprofit corporation is organized pursuant to the General Nonprofit Corporation Law for any lawful purposes and that the nonprofit corporation shall not distribute gains, profits, or dividends to members except to the extent permitted in the General Nonprofit Corporation Law. If the nonprofit corporation is organized for charitable purposes, the articles shall specifically so state. The articles shall not set forth any further or additional statement with respect to the purposes or powers of the nonprofit corporation except by way of limitation or except as expressly required by any law of this state other than this division or by any federal or other statute or regulation (including the Internal Revenue Code and regulations thereunder as a condition of acquiring or maintaining a particular status for tax purposes).

(c) The names and addresses of one or more persons who are to act in the capacity of initial directors.

Comment. Section 5250 supersedes former Section 9300; for a comparable provision, see Section 202 (General Corporation Law).

Subdivision (a) continues subdivision (a) of former Section 9300. For limitations on corporate names, see Chapter 2 (commencing with Section 14820) of Division 4.

Subdivision (b) eliminates the requirement of subdivision (b) of former Section 9300 of a statement of specific and primary purposes, but adds the requirement that a nonprofit corporation organized for charitable purposes must specifically so state. See Section 5252(b). Absent a limitation in the articles, a nonprofit corporation may engage in any lawful activity, and Section 5230 confers full corporate powers.

Subdivision (b) also continues the requirement of subdivision (c) of former Section 9300 that the nonprofit corporation state that it is organized under the General Nonprofit Corporation Law and adds the requirement that the articles state that the nonprofit corporation may not make distributions to members except as provided in this division. A nonprofit corporation may be formed for any lawful purpose other than to make such distributions (Section 5210), and such distributions are prohibited except to the extent provided in Section 5236.

Subdivision (c) supersedes a portion of the first sentence of subdivision (e) of former Section 9300. For provisions relating to initial directors, see Section 5313.

Note. The staff has not yet drafted a grandfather clause to excuse compliance with newly required provisions.

968/675

§ 5251

Substance Tentatively Approved March 1976

§ 5251. Permitted contents of articles

5251. The articles may set forth any provision, not in conflict with law, for the management of the activities and for the conduct of the affairs of the nonprofit corporation, including any provision which is required or permitted by this division to be stated in the bylaws.

Comment. Section 5251 is the same in substance as Section 204(d); it supersedes former Section 9303. See also Sections 5155.5 ("bylaws" means articles or bylaws) and 5260.5 (contents of bylaws). The authority to regulate the corporate affairs under Section 5251 includes all aspects of corporate activities, including dissolution.

The pattern of the general Nonprofit Corporation Law is to specify rules regulating the affairs of nonprofit corporations absent contrary provisions in the articles or bylaws. Some of the rules may not be varied, however. See, e.g., Section 5236 (distributions to members prohibited). Other rules may be varied only in the articles; Section 5252 relates to rules of this type.

968/684

§ 5252

Not Approved; See Minutes
March 1976

§ 5252. Provisions effective only if stated in the articles

5252. The following provisions shall not be effective unless expressly provided in the articles:

(a) A provision limiting the duration of the nonprofit corporation's existence to a specified date.

(b) A provision limiting or restricting the activity in which the nonprofit corporation may engage or the powers which the nonprofit corporation may exercise or both.

(c) A provision conferring upon the holders of any evidences of indebtedness, issued or to be issued by the nonprofit corporation, the right to vote in the election of directors and on any other matters on which members may vote.

(d) Any other provision required by this division to be provided in the articles to be effective.

Comment. Subdivision (a) of Section 5252 is the same in substance as Section 204(a)(4) (General Corporation Law). See also Section 5222 (corporate existence is perpetual unless otherwise provided in the articles).

Subdivision (b) is the same in substance as Section 204(a)(6) (General Corporation Law). See also Sections 5250 (articles), 5230 (corporate powers may be limited in articles), and 5235 (right to engage in business activity may be limited in articles).

Subdivision (c) is the same in substance as Section 204(a)(7) (General Corporation Law). It continues provisions of former Section 306 which were applicable to nonprofit corporations through former Section 9002.

Subdivision (d) is new.

Article 6. Bylaws§ 5260. Adoption of bylaws

5260. (a) Except as otherwise provided by statute, bylaws may be adopted, amended, or repealed by either of the following:

(1) The members.

(2) The board, subject to the power of the members to amend or repeal the bylaws.

(b) Notwithstanding subdivision (a):

(1) The articles or bylaws may restrict or eliminate the power of the board to adopt, amend, or repeal any or all bylaws.

(2) The articles or bylaws may require the approval of members entitled to exercise a greater fraction or percentage of the vote than would otherwise be required under this division for the adoption, amendment, or repeal of bylaws.

Comment. Section 5260 continues the substance of former Section 9400. For a comparable provision, see Section 211 (General Corporation Law). For the vote required under subdivision (a), see Sections 5615, 5630 (members) and 5339 (directors).

§ 5260.5. Permitted contents of bylaws

5260.5. The bylaws may contain any provision, not in conflict with law or the articles, for the management of the activities and for the

§ 5261

conduct of the affairs of the nonprofit corporation, including but not limited to any provision required or permitted by this article.

Comment. Section 5260.5 is the same in substance as the introductory portion of Section 212(b)(General Corporation Law). It is new to nonprofit corporation law. For provisions required or permitted in the bylaws by this article, see Sections 5261-5265.

405/368

§ 5261
Tentatively Approved
February 1976
Staff Revision May 1976

§ 5261. Bylaws relating to members

5261. Subject to this division, the bylaws may provide for:

(a) The authorized number and qualifications of members of the nonprofit corporation, if any.

(b) The different classes of membership, if any.

(c) The property, voting, and other rights or interests of members or classes of members. If the property, voting, or other rights or interests, or any of them, are unequal, the rules by which the respective property, voting, or other rights or interests of members or classes of members are fixed and determined.

(d) The liability of members to, and the method of collection of, dues or assessments.

Comment. Section 5261 continues the substance of the first two sentences of former Section 9301. See also former Sections 9402(b) and 9403. See also Section 5251 and Comment thereto (articles may set forth any matter required or permitted to be stated in the bylaws).

§ 5261

In the absence of a provision in the articles or bylaws required by this section, the nonprofit corporation is governed by rules contained in Chapter 4 (commencing with Section 5400).

Subdivision (a). If the nonprofit corporation makes no provision for the number and qualifications of members, only natural persons may be members, and no member may hold more than one membership. Section 5400.

Subdivision (b). If the nonprofit corporation makes no provision for different classes of membership, it shall be deemed to have but one class. Section 5401(a).

Subdivision (c). If the nonprofit corporation makes no provision for property, voting, or other rights and interests of members or classes, or does not set forth the rules by which they are fixed and determined, the rights and interests of members are equal as to any right or interest not so fixed. Section 5401(b).

Subdivision (d). A nonprofit corporation may levy dues or assessments only pursuant to provisions in its articles or bylaws. Section 5410. See also Section 5510 (levy of dues or assessments). It should be noted that a nonprofit corporation which levies dues or assessments may be subject to the Corporate Securities Law. See, e.g., Sections 25019 ("security" defined) and 25100(j)(exemption of certain securities).

Note. The staff has revised the introductory portion of this section to be consistent with succeeding sections.

998/835

§ 5262
Tentatively Approved
February 1976
Staff Revision May 1976

§ 5262. Additional bylaws relating to members

5262. Subject to this division, the bylaws may provide for:

(a) The admission, election, appointment, withdrawal, suspension, and expulsion of members.

(b) The transfer, forfeiture, and termination of membership, and whether the property interest of members shall cease at their death or the termination of membership, and the mode of ascertaining the property interest, if any, at the death or the termination of membership.

(c) Fees of admission and transfer fees.

(d) The mailing of annual reports and financial statements to the members.

Comment. Subdivision (a) of Section 5262 continues the substance of former Section 9402(a). Unless the bylaws make reasonable provision for withdrawal of members, a member may withdraw upon 30 days' written notice to the nonprofit corporation. Section 5408. It should be noted that a nonprofit corporation may expel a member only in substantial compliance with its provisions for expulsion and only if the member has been afforded a reasonable opportunity to be heard. See Section _____. See also Erickson v. Gospel Foundation of California, 43 Cal.2d 581, 275 P.2d 474 (1954); Ascherman v. San Francisco Medical Society, 39 Cal. App.3d 623, 114 Cal. Rptr. 68 (1974).

Subdivision (b) continues the substance of former Section 9402(c). Absent a provision for transfer of memberships, no member may transfer his membership or any right arising therefrom. Section 5407. Absent a provision relating to termination of membership, the rights of a member do not cease on death or other termination. (Section 5406.) It should be noted that one ground for forfeiture of membership may be failure to pay dues, assessments, or charges. Section 5510.

Subdivision (c) continues the first portion of former Section 9403.

Subdivision (d) contains former Section 9402(e).

Note. If provisions relating to purchase and redemption of memberships are authorized, this section should be revised accordingly.

The staff has not yet drafted a provision relating to due process in the expulsion of members.

404/384

§ 5263
Not Approved; See Minutes
March 1976

§ 5263. Bylaws relating to voting rights

5263. (a) Subject to this division, the bylaws may provide for the manner of voting by members and whether cumulative voting and proxy voting shall be allowed.

(b) A bylaw affecting the voting rights of members shall not be adopted, amended, or repealed by the board.

Comment. Subdivision (a) of Section 5263 continues former Section 9402(d). For provisions relating to cumulative voting, see Section 5708; for provisions relating to proxy voting, see Sections 5179 (proxy defined), 5640 (form of proxy), and 5705 (proxies). Where the bylaws provide a manner of voting other than at a meeting or by written consent, they should also specify any notice requirements and the vote necessary for member action.

Subdivision (b) is new. It is an exception to the rule of Section 5260(a) (manner of adoption, amendment, and repeal of bylaws).

Note. This section will be revised in light of all other decisions made with respect to members' voting rights.

404/083

§ 5264
Tentatively Approved
April 1976

§ 5264. Bylaws relating to meetings

5264. Subject to this division, the bylaws may provide for:

(a) The time, place, and manner of calling, giving notice of, and conducting regular and special meetings of members or directors.

(b) The requirements of a quorum of directors or members.

§ 5265

Comment. Section 5264 continues portions of former Section 9401(a) and (b).

Subdivision (a) permits the bylaws to specify details concerning meetings. See also Sections 5330 (directors' meetings) and 5620 (notice of members' meetings). Absent a designation of the place of meetings, members' meetings are held at the principal executive office of the nonprofit corporation. See Sections 5610 (members' meetings) and 5336 (directors' meetings). The bylaws may specify persons authorized to call meetings. See Sections 5613 (special meetings of members) and 5331 (directors' meetings). As to the manner of notice of meetings, see Sections 5623 (members' meetings) and 5332 (directors' meetings).

Subdivision (b) permits the bylaws to specify a quorum for meetings, which may be greater or less than a majority; absent a specification, a majority constitutes a quorum. Sections 5614 (quorum of members) and 5338 (quorum of directors).

404/292

§ 5265
Tentatively Approved May 1976
Staff Revision May 1976

§ 5265. Bylaws relating to directors, officers, and committees

5265. Subject to this division, the bylaws may provide for:

(a) The number, time, and manner of choosing and removal from office, qualifications, terms of office, official designations, powers, duties, and compensation of the directors and officers.

(b) The appointment and authority of committees of the board.

Comment. Section 5265 continues former Section 9302 and subdivisions (c) and (d) of former Section 9401.

For provisions relating to the number of directors, see Section 5311.

§ 5266

For provisions relating to time and manner of choosing and removal from office, see Sections 5320-5327.

For provisions relating to terms of office, see Section 5312.

For provisions relating to official designations, see Section 5164.

For provisions relating to the appointment and authority of executive or other committees of the board, see Sections 5350-5354.

Note. The staff revision added subdivision (b).

404/293

§ 5266

Tentatively Approved May 1976

§ 5266. Bylaws and articles made available to members

5266. (a) A nonprofit corporation shall keep at its principal executive office in this state, or if its principal executive office is not in this state, at its principal office in this state, the original or a copy of its bylaws and articles as amended to date. The bylaws and articles shall be open to inspection by the members at all reasonable times during office hours.

(b) If the principal executive office of the nonprofit corporation is outside this state and the nonprofit corporation has no office in this state, it shall upon the written request of any member furnish to the member a copy of the bylaws and articles as amended to date.

Comment. Section 5266 is the same in substance as Section 213 (General Corporation Law), except that Section 5266 applies to articles as well as bylaws. It supersedes former Section 9404, which provided only that a nonprofit corporation keep a record book of bylaws at its principal office.

Note. The staff has not yet considered whether this section should be applied to foreign nonprofit corporations.

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Tentatively Approved
May 1976

CHAPTER 3. DIRECTORS AND MANAGEMENT

Article 1. General Provisions Relating to Directors

§ 5310. Control of corporate affairs by board

5310. (a) Subject to the provisions of this division and any limitations in the bylaws relating to action required to be approved by the members, the activities and affairs of the nonprofit corporation and all corporate powers shall be exercised by or under the direction of the board.

(b) The board may delegate the management of the day-to-day operation of the activities of the nonprofit corporation to a management company or other person provided that the activities and affairs of the nonprofit corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.

Comment. Section 5310 is the same in substance as Section 300(a) (General Corporation Law). It continues the portion of former Section 9500 that provided that the board of directors exercises the powers, controls the property, and conducts the affairs of a nonprofit corporation. It should be noted that the authority of the board may be divided among multiple boards. See Sections 5315 (multiple boards) and 5155 ("board" defined).

Tentatively Approved
May 1976

§ 5311. Number of directors

5311. (a) The bylaws shall set forth the number of directors of the nonprofit corporation.

(b) The bylaws may provide that the number of directors shall be not less than a stated minimum nor more than a stated maximum (which in no case shall be greater than two times the stated minimum minus one), with the exact number of directors to be fixed, within the limits specified, by the board or the members in the manner provided in the bylaws.

(c) Subject to subdivision (b), a bylaw relating to the number of directors may be adopted, amended, or repealed only by the members.

(d) Notwithstanding any other provision of this section, the number or minimum number of directors shall be not less than three unless the nonprofit corporation has fewer than three members.

Comment. Section 5311 is comparable to Section 212(a) (General Corporation Law). See also Section 5265 (bylaws).

Subdivision (a) continues portions of former Sections 9302 and 9401(c) that permitted the bylaws to specify the number of directors of a nonprofit corporation and supersedes the portion of former Section 9300(e) that provided for the number of directors to be specified in the articles. The number of directors may be specified in the articles (Section 5251), in which case it may only be changed by an amendment of the articles.

Subdivision (b) supersedes the portion of former Section 9300(e) that permitted a nonprofit corporation to specify a variable number of directors. Subdivision (b) broadens the permissible limits of variation and liberalizes the specification procedure in the same manner as Section 212(a) (General Corporation Law).

Subdivision (c) continues portions of former Sections 9300(e) and 9400(c) which provided for adoption by the members of bylaws relating to the number of directors. Before any members have been admitted, or where a nonprofit corporation has no members, the directors may take any action required of members. Section 5402 (directors as members).

Subdivision (d) supersedes portions of former Sections 9300(e) and 9500 that provided for a minimum of three directors of a nonprofit corporation.

404/087

§ 5312

Not Approved; See Minutes
May 1976

§ 5312. Term of directors

5312. (a) Unless the bylaws provide otherwise:

(1) The term of office of directors is one year.

(2) Each director, including a director elected to fill a vacancy, holds office until the expiration of the term for which elected and until a successor has been elected and qualified.

(3) A reduction of the authorized number of directors does not remove a director from office prior to the expiration of the term for which elected.

(b) Notwithstanding subdivision (a), a bylaw changing the term of office of directors may be adopted only by the members.

Comment. The introductory portion of subdivision (a) of Section 5312 continues portions of former Sections 9302 and 9401(c) which permitted the articles or bylaws to regulate the terms of directors. See Section 5265. See also 56 Ops. Atty. Gen. 317 (1973).

Paragraph (a)(1) is comparable to Section 301(a)(General Corporation Law).

Paragraph (a)(2) is the same as Section 301(b)(General Corporation Law).

Paragraph (a)(3) is the same in substance as Section 303(b)(General Corporation Law). It continues a portion of former Section 809 which was applicable to nonprofit corporations through former Section 9002.

Subdivision (b) is new. It is designed to assure member control over selection of directors. See also Section 5311(c)(bylaw relating to number of directors may be adopted only by members).

Note. Subdivision (b) has been added at Commission direction and the section returned for further review.

404/088

§ 5313

Tentatively Approved
May 1976

§ 5313. Initial directors

5313. (a) Persons named in the articles to act in the capacity of initial directors are subject to all laws of this state relating to directors.

(b) Notwithstanding subdivision (a):

(1) The manner of selection of initial directors is by naming natural persons in the articles.

(2) The number of initial directors is the number of persons named in the articles.

(3) The term of office of initial directors is until the selection of their successors.

Comment. Section 5313 continues portions of former Section 9300(e). The initial directors perform all the duties of directors until the election of their successors, including whatever actions are necessary and proper to perfect the organization of the nonprofit corporation, such as adoption and amendment of bylaws and election of directors and officers. Contrast Section 210 (General Corporation Law) which vests this authority in the incorporators absent the naming of first directors.

045/218

§ 5314

Tentatively Approved
May 1976

§ 5314. Personal liability of directors

5314. A director of a nonprofit corporation is not personally liable for the debts, liabilities, or obligations of the nonprofit corporation.

Comment. Section 5314 continues former Section 9504.

406/187

§ 5315

Staff draft June 1976

§ 5315. Multiple boards

5315. A nonprofit corporation may have multiple boards of directors if all of the following conditions are satisfied:

- (a) The bylaws provide for multiple boards.

(b) The bylaws specify the manner of selection and authority of each board.

(c) The bylaws designate one board having all the authority of the board of directors provided in this division that is not specifically delegated to another board.

Comment. Section 5315 is new. It recognizes the practice of some nonprofit corporations to have more than one board of directors with a division of authority. This section is implemented by Section 5155, which defines "board" as used in this division to mean the appropriate one of multiple boards, and by Section 5164, which defines "director" to mean a member of the board.

406/188

§ 5316

Staff draft June 1976

§ 5316. Advisory and other committees

5316. A nonprofit corporation may have such advisory and other committees as it deems appropriate, provided that such committees shall not be deemed committees of the board and shall not exercise the power or authority of the board except as provided in Article 5 (commencing with Section 5350).

Comment. Section 5316 is new. It recognizes the practice of some nonprofit corporations to have advisory and other committees. Such committees are not committees of the board, however, and do not have the power or authority of the board unless they comply with Sections 5350-5354 (committees of the board). See Section 5310 (control of corporate affairs by board).

404/089

§ 5320

Tentatively Approved
May 1976

Article 2. Selection and Removal of Directors

§ 5320. Nomination of directors

5320. The bylaws shall provide a reasonable means of nominating persons for election as director of a nonprofit corporation.

Comment. Section 5320 is new.

404/090

§ 5321

Tentatively Approved
May 1976

§ 5321. Election of directors

5321. Except as otherwise provided in this division or in the bylaws, directors of a nonprofit corporation shall be elected by the voting members at a meeting of the members.

Comment. Section 5321 supersedes portions of former Sections 9302 and 9401(a), which permitted the bylaws to specify the time and manner of choosing directors. It is comparable to Section 301(a) (General Corporation Law), which provides for election of directors at the annual meeting of members. See also Sections 5611 (annual meeting of members of nonprofit corporation for election of directors) and 5265 (bylaws relating to directors).

Under this section, the bylaws may specify a procedure for selection of directors by classes of members, by persons other than members, or by means other than election at a meeting of members. Compare former Section 10202 (Corporations for Charitable or Eleemosynary Purposes),

which permitted the articles to provide for selection of trustees by specified associations or corporations, or by their officers, and by public officials. See also Sections 5611 (annual meeting), 5633 (consents required to elect directors), and 5700 (voting rights and manner of voting).

404/091

§ 5322

Tentatively Approved
May 1976

§ 5322. Vacancies of directors

5322. (a) A vacancy on the board of a nonprofit corporation exists when the authorized position of a director is not then filled by a duly elected and acting director.

(b) A vacancy may exist regardless whether it is caused by:

(1) The death, resignation, or removal of a director.

(2) A change in the authorized number of directors, whether by the board or the members.

(3) A declaration of vacancy by the board pursuant to Section 5323.

(4) Any other cause.

Comment. Section 5322 is the same in substance as Section 192 (General Corporation Law). It continues portions of former Section 806 that were applicable to nonprofit corporations through former Section 9002. For provisions relating to resignation of directors, see Section 5324. For provisions relating to removal of directors, see Section 5325. For provisions relating to a change in the authorized number of directors, see Sections 5311 and 5312. For provisions relating to a declaration of vacancy by the board, see Section 5323.

404/092

§ 5323

Tentatively Approved
May 1976

§ 5323. Declaration of vacancy by board

5323. The board may declare vacant the office of a director in any of the following cases:

(a) The director has been declared of unsound mind by an order of court.

(b) The director has been convicted of a felony.

(c) Any other cause provided in the bylaws.

Comment. Subdivisions (a) and (b) of Section 5323 are the same in substance as Section 302 (General Corporation Law). They continue a portion of former Section 807, which was applicable to nonprofit corporations through former Section 9002. Subdivision (c) is new.

404/093

§ 5324

Tentatively Approved
May 1976

§ 5324. Resignation of directors

5324. (a) A director of a nonprofit corporation may resign by giving written notice to the board, the chairman of the board, the president, or the secretary.

(b) The resignation is effective upon giving the notice, or after such period not exceeding 30 days as is provided in the bylaws, unless the notice specifies a later time for the effectiveness of the resignation.

(c) If the resignation is effective at a future time, a successor may be elected to take office when the resignation becomes effective.

Comment. Section 5324 is the same in substance as Section 305(d) (General Corporation Law) except that the bylaws may provide a notice period not exceeding 30 days. It continues portions of former Section 809 which were applicable to nonprofit corporations through former Section 9002.

404/094

§ 5325

Tentatively Approved
May 1976

§ 5325. Removal of directors

5325. Unless otherwise provided in the bylaws, a director may be removed from office:

(a) Without cause, by vote of members holding a majority of the voting power. A director elected pursuant to a provision of the bylaws for election of directors by classes may be removed only by members of the class entitled to elect the director.

(b) In case of fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the nonprofit corporation, by the superior court of the proper county on petition by 10 percent of the members of any class in an action to which the nonprofit corporation is made a party. The court may bar from reelection a director so removed for a period prescribed by the court.

Comment. The introductory portion of Section 5325 continues a portion of former Section 9302 (articles or bylaws may provide manner of removal of directors).

Subdivision (a) is comparable to a portion of Section 303(a) (General Corporation Law). It continues a portion of former Section 810 that was applicable to nonprofit corporations through former Section 9002. Where directors are elected by classes of members, a director may be removed only by a majority of the class that elected him. See Section 5194.5(b) ("voting power" based on percentage of directors elected by class vote).

Subdivision (b) is the same in substance as Section 304 (General Corporation Law). It continues former Section 811, which was applicable to nonprofit corporations through former Section 9002, except that only 10 percent of the members of a class, as opposed to 10 percent of the whole membership, is required.

404/095

§ 5326

Tentatively Approved
May 1976

§ 5326. Filling vacancies

5326. Unless otherwise provided in the bylaws:

(a) Vacancies on the board may be filled by a majority of directors then in office, whether or not less than a quorum, or by a sole remaining director.

(b) The voting members may elect a director at any time to fill a vacancy not filled by the directors.

Comment. Subdivision (a) of Section 5326 is the same in substance as the first sentence of Section 305(a) (General Corporation Law). It continues former Section 9502. See Cavin Memorial Corp. v. Requa, 5 Cal. App.3d 345, 85 Cal. Rptr. 107 (1970).

Subdivision (b) is the same in substance as the first sentence of Section 305(b)(General Corporation Law). It continues a portion of former Section 809, which was applicable to nonprofit corporations through former Section 9002.

404/097

§ 5327

Tentatively Approved
May 1976

Renumbered May 1976

§ 5327. Appointment of directors by court

5327. If a nonprofit corporation has no voting members other than the directors and all the directors resign, die, or become incompetent, the superior court of any county may appoint directors of the nonprofit corporation upon application of any party in interest.

Comment. Section 5327 is the same in substance as Section 306 (General Corporation Law). It continues the portion of former Section 809.5 that applied to nonprofit corporations except that (1) application may be made to the superior court of any county rather than the county in which the principal office of the nonprofit corporation is located and (2) application may be made by any party having an interest in the nonprofit corporation as well as a creditor or the personal representative of a deceased director or the guardian or conservator of an incompetent director.

Tentatively Approved
May 1976

Article 3. Meetings of Directors

§ 5330. Bylaws control

5330. The provisions of this article apply to meetings of the board unless otherwise provided in the bylaws.

Comment. Section 5330 is the same in substance as the introductory portion of Section 307 (General Corporation Law). It continues former Section 9401(a) which permitted the bylaws of a nonprofit corporation to make provisions for the time, place, and manner of calling, giving notice of, and conducting regular and special meetings of directors and to dispense with notice of all regular directors' meetings. It continues former Section 9401(b) which permitted the bylaws of a nonprofit corporation to provide for the requirements of a quorum of directors, which could be greater or less than a majority. See also former Section 9503 (meetings of directors called and held as ordered by directors, subject to the articles or bylaws). For exceptions to Section 5330, see Sections 5332(b) (bylaws may not dispense with notice of special meetings), 5337(a) (bylaws may not permit act of board by less than a majority of directors present at meeting), 5338 (validation of defectively noticed meeting), and 5339 (written consent to action without a meeting).

Tentatively Approved
May 1976

§ 5331. Call of meetings

5331. Meetings of the board shall be called and held as may be ordered by the directors.

Comment. Section 5331 is comparable to Section 307(a)(1)(General Corporation Law). It is the same in substance as former Section 9503. It should be noted that Section 5331 is subject to Section 5330 (bylaws control).

404/100

§ 5332

Tentatively Approved
May 1976

§ 5332. Notice of meetings

5332. (a) Regular meetings of the board may be held without notice if the time and place of the meetings are fixed by the bylaws or the board.

(b) Special meetings of the board shall be held upon four days' notice by mail or 48 hours' notice delivered personally or by telephone or telegraph. The bylaws may not dispense with notice of a special meeting.

(c) Notice of a meeting need not be given to a director who signs a waiver of notice, whether before or after the meeting, or who attends the meeting without protesting, prior to its commencement, the lack of notice.

(d) A notice or waiver of notice need not specify the purpose of any regular or special meeting of the board.

Comment. Section 5332 is the same in substance as Section 307(a)(2) and (3)(General Corporation Law). Subdivision (a) supersedes the second sentence of former Section 9401(a)(bylaws may dispense with notice of all regular directors' meetings). It should be noted that Section 5332 is subject to Section 5330 (bylaws control) except to the extent provided in subdivision (b).

404/101

§ 5333

Tentatively Approved
May 1976

§ 5333. Adjournment of meetings

5333. (a) A majority of the directors present, whether or not a quorum is present, may adjourn a meeting to another time and place.

(b) If a meeting is adjourned for more than 24 hours, notice of the adjournment to another time or place shall be given prior to the time of the adjourned meeting to the directors who were not present at the time of adjournment.

Comment. Section 5333 is the same in substance as Section 307(a)(4) (General Corporation Law). It is new to nonprofit corporation law. It should be noted that Section 5333 is subject to Section 5330 (bylaws control).

405/958

§ 5334

Tentatively Approved
May 1976

Renumbered June 1976

§ 5334. Place of meetings

5334. Meetings of the board may be held at any place within or without the state designated in the notice of the meeting or, if not stated in the notice or there is no notice, designated in the bylaws or by resolution of the board.

Comment. Section 5334 is the same in substance as Section 307(a)(5) (General Corporation Law). It continues the portion of former Section

9401(a), which provided for the bylaws to specify the place of meetings of directors and permitted meetings to be held outside the state. It should be noted that Section 5334 is subject to Section 5330 (bylaws control).

405/442

§ 5335

Tentatively Approved
May 1976

Renumbered June 1976

§ 5335. Meeting by conference telephone

5335. (a) Directors may participate in a meeting of the board through use of conference telephone or similar communications equipment so long as all directors participating in the meeting can hear one another.

(b) Participation by a director in a meeting pursuant to this section constitutes presence in person by the director at the meeting.

Comment. Section 5335 is the same in substance as Section 307(a)(6) (General Corporation Law). It is new to nonprofit corporation law. It should be noted that Section 5335 is subject to Section 5330 (bylaws control).

405/443

§ 5336

Tentatively Approved
May 1976

Renumbered June 1976

§ 5336. Quorum of directors

5336. (a) A majority of the authorized number of directors constitutes a quorum of the board for the transaction of business.

(b) The bylaws may provide that a quorum of directors is greater or less than a majority.

Comment. Subdivision (a) of Section 5336 is the same in substance as the first sentence of Section 307(a)(7)(General Corporation Law). Subdivision (b) continues the portion of former Section 9401(b) that applied to a quorum of directors.

405/444

§ 5337

Tentatively Approved
May 1976

Staff Revision and Renumbering
June 1976

§ 5337. Acts of the board

5337. (a) Except as otherwise provided in this division, every act or decision done or made by a majority of the directors present at a meeting duly held at which a quorum is present is the act of the board. The bylaws may not provide that a lesser vote than a majority of the directors present at a meeting is the act of the board.

(b) A meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of directors, if any

action taken is approved by at least a majority of the required quorum for the meeting.

Comment. Section 5337 is the same in substance as Section 307(a)(8) (General Corporation Law). It continues former Section 817, which was applicable to nonprofit corporations through former Section 9002, with the addition of subdivision (b) which is intended to preclude disruption of meetings by withdrawal of a sufficient number of directors to leave less than a quorum. It should be noted that, with the exception of the second sentence of subdivision (a), Section 5337 is subject to Section 5330 (bylaws control) and to contrary provisions of this division. See, e.g., Sections 5371 (contracts approved without counting vote of interested or common director) and 5384 (indemnification approved by majority vote of a quorum not including director to be indemnified).

Note. The staff revision adds the second sentence to subdivision (a) in conformity with AB 2349.

405/956

§ 5338

Tentatively Approved
May 1976

Renumbered June 1976

§ 5338. Validation of defectively noticed meeting

5338. Notwithstanding any other provision of this article, the transactions of a meeting of the board, however called and noticed or wherever held, are as valid as though had at a meeting duly held after regular call and notice if all of the following conditions are satisfied:

(a) A quorum is present.

(b) Either before or after the meeting, each director not present

signs a written waiver of notice, a consent to holding the meeting, or an approval of the minutes of the meeting.

(c) All waivers, consents, and approvals are filed with the corporate records or made a part of the minutes of the meeting.

Comment. Section 5338 is the same in substance as Section 307(b) (General Corporation Law). It continues provisions of former Section 814 which were applicable to nonprofit corporations through former Section 9002. It should be noted that Section 5334 is not subject to Section 5330 (bylaws control).

405/957

§ 5339

Tentatively Approved
May 1976

Renumbered June 1976

§ 5339. Written consent to action without a meeting

5339. Notwithstanding any other provision of this article:

(a) Any action required or permitted to be taken by the board may be taken without a meeting if all directors individually or collectively consent in writing to the action.

(b) The written consents shall be filed with the minutes of the proceedings of the board.

(c) Action by written consent has the same force and effect as a unanimous vote of the directors.

Comment. Section 5339 is the same in substance as Section 307(c) (General Corporation Law). It continues former Section 9503.1, with the

exception of the last sentence relating to authority in the articles or bylaws to take action by written consent, which is not continued in order to eliminate needless complexity in the articles and bylaws. It should be noted that Section 5339 is not subject to Section 5330 (bylaws control).

Article 4. Provisional Directors

Comment. Article 4, commencing with Section 5340, supersedes former Section 819, which was applicable to nonprofit corporations through former Section 9002. It is comparable to Section 308 (General Corporation Law).

045/219

§ 5340

Tentatively Approved
May 1976

§ 5340. Superior court may appoint provisional directors

5340. The superior court of the proper county may, notwithstanding any provisions of the bylaws, appoint a provisional director pursuant to this article.

Comment. Section 5340 is new.

405/446

§ 5341

Tentatively Approved
May 1976

§ 5341. Deadlock among directors

5341. (a) Appointment of a provisional director may be made if both of the following conditions are satisfied:

(1) The directors are equally divided and cannot agree as to the management of the affairs of the nonprofit corporation.

(2) As a result of the inability of the directors to agree, the activities of the nonprofit corporation can no longer be conducted to advantage or there is danger that the property and activities of the nonprofit corporation will be impaired or lost.

(b) Action for appointment under this section may be brought by a director or by 50 voting members or by members holding not less than 10 percent of the voting power.

(c) This section applies whether or not an action is pending for an involuntary winding up or dissolution of the nonprofit corporation.

Comment. Section 5341 is the same in substance as Section 308(a) (General Corporation Law) except that 50 members or 10 percent may petition for appointment.

405/448

§ 5342

Tentatively Approved
May 1976

Renumbered June 1976

§ 5342. Qualifications of provisional directors

5342. A provisional director shall be an impartial person who is neither a member nor a creditor of the nonprofit corporation nor related by consanguinity or affinity within the third degree according to the common law to any of the other directors of the nonprofit corporation or to any judge of the court by which the provisional director is appointed.

Comment. Section 5342 is the same in substance as the first sentence of Section 308(c) (General Corporation Law).

405/449

§ 5343

Tentatively Approved
May 1976

Renumbered June 1976

§ 5343. Rights and powers of provisional directors

5343. A provisional director shall have all the rights and powers of a director until the conditions of subdivision (a) of Section 5341 are no longer satisfied or until removed by order of the court or by members holding a majority of the voting power.

Comment. Section 5343 is comparable to the second sentence of Section 308(c) (General Corporation Law).

405/450

§ 5344

Tentatively Approved
May 1976

Renumbered June 1976

§ 5344. Compensation of provisional directors

5344. A provisional director is entitled to such compensation as is fixed by the court unless otherwise agreed with the nonprofit corporation.

Comment. Section 5344 is the same in substance as the third sentence of Section 308(c) (General Corporation Law).

405/452

§ 5350

Tentatively Approved
May 1976

Renumbered June 1976

Article 5. Committees of the Board

§ 5350. Designation of committees

5350. Unless the bylaws provide otherwise, the board may, by resolution adopted by a majority of the authorized number of directors, designate one or more committees of the board pursuant to this article.

Comment. Section 5351 is the same in substance as the first portion of the first sentence of Section 311 (General Corporation Law). It supersedes former Section 9401(d) which permitted the bylaws to make provisions for the appointment and authority of executive or other committees of the board of directors.

It should be noted that the board may appoint advisory and other committees not pursuant to this article, which may consist of persons other than directors. See Section 5316 (advisory and other committees). Such committees, however, may not exercise the power of the board. See Section 5310 (control of corporate affairs by board).

405/453

§ 5351

Tentatively Approved
May 1976

Renumbered June 1976

§ 5351. Designation of committee members

5351. (a) A committee of the board shall consist of two or more directors.

(b) Unless the bylaws provide that particular directors are members of specified committees, committee members are designated by the board and serve at the pleasure of the board.

Comment. Section 5351 is comparable to the last portion of the first sentence of Section 311 (General Corporation Law).

405/454

§ 5352

Tentatively Approved
May 1976

Renumbered June 1976

§ 5352. Designation of alternate committee members

5352. Unless otherwise provided in the bylaws:

(a) The board may designate one or more directors as alternate members of a committee.

(b) An alternate committee member may replace an absent committee member at a meeting of the committee.

Comment. Section 5352 is the same in substance as the second sentence of Section 311 (General Corporation Law) except that the bylaws may vary the requirements of Section 5352.

Tentatively Approved
May 1976

Renumbered June 1976

§ 5353. Authority of committees

5353. (a) A committee of the board, to the extent provided in the resolution of the board or in the bylaws, shall have all the authority of the board.

(b) Notwithstanding subdivision (a), a committee of the board shall not have authority to do any of the following acts:

(1) Approve any action for which this division also requires approval of the members.

(2) Fill vacancies on the board or in a committee.

(3) Fix compensation of the directors for serving on the board or on a committee.

(4) Amend or repeal bylaws or adopt new bylaws.

(5) Amend or repeal a resolution of the board which by its express terms is not so amendable or repealable.

(v) Appoint other committees of the board or committee members.

Comment. Section 5353 is the same in substance as Section 311(a)-(g) (General Corporation Law) except that Section 311(f) is not duplicated since a nonprofit corporation cannot make distributions to members. See Section 5236.

405/834

§ 5354

Tentatively Approved
May 1976

Renumbered June 1976

§ 5354. Meetings of committees

5354. Article 3 (commencing with Section 5330) applies to meetings of a committee of the board and to action by the committee, mutatis mutandis.

Comment. Section 5354 is the same in substance as Section 307(d) (General Corporation Law). The phrase "mutatis mutandis" means necessary changes having been made.

Tentatively Approved
May 1976

Article 6. Officers

§ 5360. Corporate officers

5360. A nonprofit corporation shall have all of the following officers:

(a) A chairman of the board or a president, or both.

(b) A secretary.

(c) A chief financial officer.

(d) Other officers with such titles and duties as (i) are stated in the bylaws, (ii) are determined by the board, or (iii) may be necessary to enable the nonprofit corporation to sign instruments.

Comment. Section 5360 is the same in substance as the first sentence of Section 312(a) (General Corporation Law). It supersedes the first sentence of former Section 821, which was applicable to nonprofit corporations through former Section 9002. See also former Section 9401(c) (bylaws may make provisions for the number, official designations and duties of directors and other officers).

Tentatively Approved
May 1976

Staff Revision June 1976

§ 5361. Chief executive officer

5361. Unless otherwise provided in the bylaws, the president, or if there is no president, the chairman of the board is the chief execu-

tive officer of the nonprofit corporation.

Comment. Section 5361 is the same in substance as the second sentence of Section 312(a)(General Corporation Law) except that the president or chairman of the board is not defined as the general manager of a nonprofit corporation. It is new to nonprofit corporation law.

Note. The staff revision deletes the reference to "general manager" since the only utility the staff has been able to discover for the reference is in the service of process provisions where "general manager" has a meaning other than chief executive officer.

405/837

§ 5362

Tentatively Approved
May 1976

§ 5362. Selection of officers

5362. Except as otherwise provided by the bylaws or a resolution of the board:

(a) Officers are chosen by the board and serve at the pleasure of the board.

(b) Any number of offices may be held by the same person.

Comment. Subdivision (a) of Section 5362 is the same in substance as the first sentence of Section 312(b)(General Corporation Law). It continues a portion of the first sentence of former Section 821 which was applicable to nonprofit corporations through former Section 9002. See also former Section 9401 (bylaws may make provisions for the manner of choosing and terms of office of directors and other officers).

Subdivision (b) supersedes the third sentence of former Section 821, which was applicable to nonprofit corporations through former Section 9002, and which permitted a person to hold two or more offices except those of president and secretary.

Tentatively Approved
May 1976

§ 5363. Resignation of officers

5363. (a) An officer may resign at any time upon written notice to the nonprofit corporation subject to a notice period in the bylaws not exceeding 30 days.

(b) Resignation of an officer is without prejudice to the rights, if any, of the nonprofit corporation under a contract to which the officer is a party.

Comment. Section 5363 is the same in substance as the second sentence of Section 312(b)(General Corporation Law) except that the bylaws may provide a notice period not exceeding 30 days. It is new to nonprofit corporation law.

Tentatively Approved
May 1976

Article 7. Standards of Conduct by Management

§ 5370. Duty of care of directors

5370. (a) Subject to Section 5560, a director shall perform the duties of a director, including duties as a member of a committee of the board upon which the director serves, in good faith, in a manner the director believes to be in the best interests of the nonprofit corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

(b) In performing the duties of a director, a director shall be entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, so long as the director acts in good faith, after reasonable inquiry when the need therefor is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted, where the information, opinion, report, or statement is prepared or presented by any of the following:

(1) One or more officers or employees of the nonprofit corporation whom the director believes to be reliable and competent in the matters presented.

(2) Counsel, independent accountants, or other persons as to matters the director believes to be within the person's professional or expert competence.

(3) A committee of the board upon which the director does not serve, as to matters within its designated authority, which committee the director believes to merit confidence.

(c) A person who performs the duties of a director in accordance with this section shall have no liability based upon an alleged failure to discharge the person's obligations as a director.

Comment. Section 5370 is the same in substance as Section 309 (General Corporation Law). It sets a standard of care for directors of nonprofit corporations generally. This standard is subject to fiduciary obligations in the case of assets held on charitable trust or by a nonprofit corporation organized for charitable purposes. See Section 5560.

405/840

§ 5371

Tentatively Approved
May 1976

§ 5371. Contracts involving interested directors

5371. (a) This section applies to a contract or other transaction between a nonprofit corporation and (i) a director of the nonprofit corporation or (ii) a business or nonprofit corporation, firm, or association in which a director of the nonprofit corporation has a material financial interest.

(b) No contract or other transaction described in subdivision (a) is either void or voidable because (i) the director or the other business or nonprofit corporation, firm, or association are parties or (ii) the director is present at the meeting of the board or a committee of

the board which authorizes, approves, or ratifies the contract or transaction, if any of the following circumstances exist:

(1) The material facts as to the contract or transaction and as to the director's interest are fully disclosed or known to the members and the contract or transaction is approved by the members in good faith, with the interested director not being entitled to vote thereon.

(2) The material facts as to the contract or transaction and as to the director's interest are fully disclosed or known to the board or committee, and the board or committee authorizes, approves, or ratifies the contract or transaction in good faith by a vote sufficient without counting the vote of the interested director, and the contract or transaction is just and reasonable as to the nonprofit corporation at the time it was authorized, approved, or ratified.

(3) The person asserting the validity of the contract or transaction sustains the burden of proving that the contract or transaction was just and reasonable as to the nonprofit corporation at the time it was authorized, approved, or ratified.

(c) An interested director may be counted in determining the presence of a quorum at a meeting of the board or a committee of the board which authorizes, approves, or ratifies a contract or transaction.

(d) A common directorship in and of itself does not constitute a material financial interest within the meaning of this subdivision. A director is not interested within the meaning of this section in a resolution fixing the compensation of another director as a director, officer, or employee of the nonprofit corporation, notwithstanding the fact that the first director is also receiving compensation from the nonprofit corporation.

Comment. Section 5371 is the same in substance as Section 310(a) (General Corporation Law). It supersedes provisions of former Section 820 which were applicable to nonprofit corporations through former Section 9002.

045/220

§ 5372

Tentatively Approved
May 1976

§ 5372. Contracts involving common directors

5372. (a) This section applies to a contract or other transaction between a nonprofit corporation and business or nonprofit corporation or association of which a director of the nonprofit corporation is a director. This section does not apply to a contract or transaction described in subdivision (a) of Section 5371.

(b) No contract or other transaction described in subdivision (a) is either void or voidable because the director is present at the meeting of the board or a committee of the board which authorizes, approves, or ratifies the contract or transaction, if any of the following circumstances exist:

(1) The material facts as to the contract or transaction and as to the director's other directorship are fully disclosed or known to the board or committee, and the board or committee authorizes, approves, or ratifies the contract or transaction in good faith by a vote sufficient without counting the vote of the common director.

(2) The contract or transaction is approved by the members in good faith.

(3) The contract or transaction is just and reasonable as to the nonprofit corporation at the time it is authorized, approved, or ratified.

(c) A common director may be counted in determining the presence of a quorum at a meeting of the board or a committee of the board which authorizes, approves, or ratifies a contract or transaction.

Comment. Section 5372 is the same in substance as Section 310(b) (General Corporation Law). It supersedes provisions of former Section 820 which were applicable to nonprofit corporations through former Section 9002.

Because "material financial interest" is not defined in Section 5371, a common director who has more than a mere common directorship should rely on the validating provisions of Section 5372 only with caution.

406/208

§ 5373

Tentatively Approved
May 1976

§ 5373. Loans to directors and officers

5373. A nonprofit corporation shall not make a loan of money or property to, or guarantee the obligation of, a director or officer of the nonprofit corporation or of the parent or a subsidiary of the nonprofit corporation unless the provisions of one of the following subdivisions are satisfied:

(a) The loan or guarantee is approved by a majority of the members of all classes (other than the benefited director or officer).

(b) The loan or guarantee is pursuant to an employee benefit plan approved by the members after disclosure of the right to include officers or directors under the plan if the board determines that the loan or guaranty may reasonably be expected to benefit the nonprofit corporation. The loan or guaranty may be with or without interest and may be unsecured or secured in a manner the board approves.

(c) The loan is an advance for expenses reasonably anticipated to be incurred in the performance of the duties of the director or officer, for which the director or officer would be entitled to reimbursement by the nonprofit corporation.

Comment. Section 5373 is comparable to Section 315 (General Corporation Law). It supersedes former Section 823, which was applicable to nonprofit corporations through former Section 9002.

Note. Whether this section is applicable to credit unions, and whether there are in existence any mutual savings banks, is to be determined by the staff.

100/378

§ 5374

Substance Tentatively Approved May 1976

§ 5374. Special derivative action against directors

5374. (a) This section applies to the following corporate actions:

(1) A distribution to members contrary to Chapter 5 (commencing with Section 5500).

(2) A distribution of assets contrary to Section 7030.

(3) A loan or guaranty contrary to Section 5373.

(b) Subject to Section 5370, a director of a nonprofit corporation who approves, or who is present and abstains from voting at a meeting of the board or committee at which is approved, a corporate action described in subdivision (a) is liable to the nonprofit corporation for the benefit of all creditors and members entitled under subdivision (c) to institute an action. Liability of directors under this subdivision is joint and several.

(c) An action may be brought under this section in the name of the nonprofit corporation without regard to Chapter 8 (commencing with Section 5800) by:

(1) A creditor whose debt or claim is prior to the time of the corporate action described in subdivision (a) and who has not consented to the corporate action, whether or not the creditor's claim is reduced to judgment.

(2) A member at the time of the corporate action described in subdivision (a) who has not consented to the corporate action.

(d) The damages recoverable from a director under this section are the lesser of the following:

(1) The amount of the illegal distribution or the loss suffered by the nonprofit corporation as a result of the illegal loan or guaranty.

(2) The liabilities of the nonprofit corporation owed to nonconsenting creditors at the time of the violation.

(e) A director liable under this section:

(1) Is entitled to be subrogated to the rights of the nonprofit corporation against a person who received the illegal distribution, loan, or guaranty.

(2) May compel contribution by other directors liable under this section.

Comment. Section 5374 is comparable to Section 316 (General Corporation Law). Section 5374 supersedes former Sections 823-829, which were applicable to nonprofit corporations through former Section 9002.

Subdivision (b) continues existing law. A director may be liable to persons other than the nonprofit corporation for approval of corporate actions listed in subdivision (a), but subdivision (c)(1) provides the exclusive means of action for creditors to enforce the liability of directors. See also Section 7037 (action by creditor in name of nonprofit corporation to enforce recovery of improper distribution to members). Subdivision (c)(1) removes the limitation of prior law that only judgment creditors might bring an action in the name of the nonprofit corporation. Compare former Section 826.

Subdivision (e) provides a director liable under this section the right to contribution by other directors and subrogation against other persons. These rights may be enforced either in the action in which the director is held liable or in an independent action pursuant to the ordinary rules of civil practice.

Article 8. Indemnification of Corporate Agents

Comment. Article 8 (commencing with Section 5380) supersedes former Section 830, which was applicable to nonprofit corporations through former Section 9002. It is comparable to Section 317 (General Corporation Law).

968/614

§ 5380

Tentatively Approved
May 1976

§ 5380. Definitions

5380. For the purposes of this article:

(a) "Agent" means a person who is or was a director, officer, employee, or other agent of any of the following entities:

(1) The nonprofit corporation or a predecessor nonprofit corporation.

(2) Another nonprofit corporation, a business corporation, a partnership, a joint venture, a trust, or other enterprise at the request of the nonprofit corporation or a predecessor nonprofit corporation.

(b) "Proceeding" means a threatened, pending, or completed action or proceeding, whether civil, criminal, administrative, or investigative.

(c) "Expenses" includes without limitation attorney's fees and any expenses of establishing a right to indemnification under Section 5383 or subdivision (c) of Section 5384.

Comment. Section 5380 is the same in substance as Section 317(a) (General Corporation Law).

968/615

§ 5381

Tentatively Approved
May 1976

§ 5381. Indemnification in proceedings other than derivative actions

5381. (a) A nonprofit corporation may indemnify a person or the estate of a person who was or is a party or is threatened to be made a party to a proceeding (other than an action by or in the right of the nonprofit corporation) by reason of the fact that the person is or was an agent, against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with the proceeding.

(b) Indemnification under subdivision (a) may not be made unless both of the following conditions are satisfied:

(1) The person acted in good faith and in a manner the person reasonably believed to be in the best interests of the nonprofit corporation.

(2) In the case of a criminal proceeding, the person had no reasonable cause to believe the conduct was unlawful.

(c) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the conditions of subdivision (b) are not satisfied.

Comment. Section 5381 is the same in substance as Section 317(b) (General Corporation Law) with the clarifying language that the estate of an agent may be indemnified.

963/616

§ 5382

Tentatively Approved
May 1976

§ 5382. Indemnification in derivative actions

5382. (a) A nonprofit corporation may indemnify a person or the estate of a person who was or is a party or is threatened to be made a party to a threatened, pending, or completed action by or in the right of the nonprofit corporation to procure a judgment in its favor by reason of the fact that the person is or was an agent, against expenses actually and reasonably incurred by the person in connection with the defense or settlement of the action.

(b) Indemnification under subdivision (a) may not be made unless the person acted in good faith, in a manner the person believed to be in the best interests of the nonprofit corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

(c) No indemnification may be made under subdivision (a) for any of the following:

(1) Amounts paid in settling or otherwise disposing of a threatened or pending action, with or without court approval.

(2) Expenses incurred in defending a threatened or pending action which is settled or otherwise disposed of without court approval.

(3) Expenses incurred in connection with a claim, issue, or matter as to which the person is adjudged liable to the nonprofit corporation in the performance of the person's duty to the nonprofit corporation except to the extent that the court in which the action was brought determines upon application that, in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for such expenses as the court determines.

Comment. Section 5382 is the same in substance as Section 317(c) (General Corporation Law) with the clarifying language that the estate of an agent may be indemnified. It should be noted that a derivative action under Chapter 8 may be settled or otherwise disposed of only with court approval. Section 5840.

968/621

§ 5383

Tentatively Approved
May 1976

§ 5383. Indemnification where agent prevails on merits

5383. A nonprofit corporation shall indemnify a person or the estate of a person who has been successful on the merits in defense of a proceeding described in Section 5381 or 5382, or in defense of a claim, issue, or matter therein, against expenses actually and reasonably incurred by the person in connection therewith.

Comment. Section 5383 is the same in substance as Section 317(d) (General Corporation Law) with the clarifying language that the estate of an agent may be indemnified.

406/207

§ 5384

Tentatively Approved
May 1976

§ 5384. Corporate action required for indemnification

5384. Except as provided in Section 5383, indemnification may be made under this article by the nonprofit corporation only if, upon a determination that the conditions prescribed in Section 5381 or 5382 are satisfied, indemnification is authorized by one of the following:

(a) A majority vote of a quorum consisting of directors who are not parties to the proceeding.

(b) Approval of the members, with the person to be indemnified not being entitled to vote thereon.

(c) Order of the court in which the proceeding is or was pending, upon application made by (1) the nonprofit corporation or (2) the agent, attorney, or other person rendering services in connection with the defense, whether or not opposed by the nonprofit corporation.

Comment. Section 5384 is the same in substance as Section 317(e) (General Corporation Law).

968/622

§ 5385

Tentatively Approved
May 1976

§ 5385. Authority to advance expenses

5385. (a) Expenses incurred by an agent in defending a proceeding may be advanced by the nonprofit corporation prior to final disposition of the proceeding.

(b) The advance shall be conditioned on receipt of an undertaking by or on behalf of the agent to repay the amount of the advance unless it is determined ultimately that the agent is entitled to be indemnified as authorized in this article.

Comment. Section 5385 is the same in substance as Section 317(f) (General Corporation Law).

968/623

§ 5386

Tentatively Approved
May 1976

§ 5386. Indemnification other than pursuant to this article

5386. (a) No provision made by a nonprofit corporation to indemnify its or its subsidiary's directors or officers for the defense of any proceeding, whether contained in the bylaws, a resolution of members or directors, an agreement, or otherwise, is valid unless consistent with this article.

(b) Nothing contained in this article affects the right to indemnification to which persons other than those described in subdivision (a) may be entitled by contract or otherwise.

Comment. Section 5386 is the same in substance as Section 317(g) (General Corporation Law).

Tentatively Approved
May 1976

§ 5387. Limitation on indemnification

5387. Except as provided in Section 5383 or subdivision (c) of Section 5384, no indemnification or advance may be made under this article where either of the following appears:

(a) It would be inconsistent with the bylaws, a resolution of the members, or an agreement in effect at the time of accrual of the cause of action asserted in the proceeding, which prohibits or otherwise limits indemnification.

(b) It would be inconsistent with a condition expressly imposed by a court in approving a settlement.

Comment. Section 5387 is the same in substance as Section 317(h) (General Corporation Law).

Tentatively Approved
May 1976

§ 5388. Insurance for corporate agents

5388. A nonprofit corporation may purchase and maintain insurance on behalf of a person against a liability asserted against or incurred by the person as an agent or arising out of the person's status as an agent, whether or not the nonprofit corporation would have the power under this article to indemnify the person against the liability.

Comment. Section 5388 is the same in substance as Section 317(i) (General Corporation Law).

969/020

§ 5389

Tentatively Approved

May 1976

§ 5389. Application of article to fiduciary of employee benefit plan

5389. (a) Notwithstanding subdivision (a) of Section 5380, this article does not apply to a proceeding against a person in the capacity of a trustee, investment manager, or other fiduciary of an employee benefit plan.

(b) Nothing in this article affects or limits a right to indemnification to which a person described in subdivision (a) may be entitled by contract or otherwise.

Comment. Section 5389 is the same in substance as Section 317(j) (General Corporation Law). Persons described in this section may be indemnified by the nonprofit corporation without regard to the limitations of this article.

406/209

§ 5390

Tentatively Approved
May 1976

Article 9. Authentication of Corporate Instruments

§ 5390. Certified copy of corporate action

5390. The original or a copy, if certified to be a true copy by a person purporting to be the secretary or an assistant secretary of the nonprofit corporation, of the bylaws or of a resolution or the minutes of a meeting of members, directors, or committee is prima facie evidence of the adoption thereof and matters stated therein.

Comment. Section 5390 is the same in substance as Section 314 (General Corporation Law). It continues former Section 832, which was applicable to nonprofit corporations through former Section 9002.

969/019

§ 5391

Not Approved; See Minutes
May 1976

§ 5391. Validity of corporate instruments signed by officers

5391. (a) This section applies when a note, mortgage, evidence of indebtedness, contract, conveyance, or other instrument in writing, or an assignment or endorsement thereof, is signed by both of the following officers:

(1) The chairman of the board, the president, or any vice president.

(2) The secretary, chief financial officer, treasurer, or any assistant secretary or assistant treasurer.

(b) An instrument described in subdivision (a) which is executed or entered into between the nonprofit corporation and any other person is not invalidated as to the nonprofit corporation by any lack of authority of the signing officers unless (subject to subdivision (a) of Section 5231) the other person has actual knowledge that the signing officers had no authority to execute the instrument.

Comment. Section 5391 is the same in substance as Section 313 (General Corporation Law). It is not intended to create an inference that instruments not signed by both the officers described in subdivision (a) are invalid; other validating concepts such as apparent authority and inherent agency may be applicable to preclude a defense against enforcement of a contract or conveyance on grounds of lack of authority. See Section 5231(a). It should be noted that even actual knowledge of lack of authority may not be a defense in certain cases. See Section 5231(a).

Note. The staff has yet to revise this section for clarity and analyze its effect both on the corporation and on third persons.

CHAPTER 4. MEMBERS

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Tentatively Approved
February 1976

Renumbered June 1976

CHAPTER 4. MEMBERS

Article 1. General Provisions

§ 5410. Members

5410. Unless the bylaws provide otherwise:

- (a) Only natural persons may be members of a nonprofit corporation.
- (b) No member may hold more than one membership, a fractional membership, or a joint interest in a membership.
- (c) If the bylaws provide for members other than natural persons, a natural person may be a member and have an interest in one or more members other than natural persons even though the bylaws do not provide that a member may hold more than one membership.

Comment. Section 5410 is new; it provides general rules regarding who or what may be members of nonprofit corporations and how the membership may be held which apply in the absence of a bylaw to the contrary.

Subdivision (a) makes clear that, if the nonprofit corporation desires to permit business corporations, other nonprofit corporations, or partnerships or other unincorporated associations to be members, it must affirmatively provide therefor. Former law did not provide a rule applicable where the bylaws remained silent. When a nonprofit corporation provides that corporations, partnerships, associations, families, or other groups may become members, it should make any other necessary provisions regarding classes of members, voting rights of the different types of members (including multiple or fractional voting), the benefits and privileges available to different membership classes, additional qualifications for admission to membership, and dues and assessments. See Section 5261. See also Section 5703 (voting of membership held by corporation).

Subdivision (b) makes clear that, unless a different rule is provided in the nonprofit corporation's bylaws, each member may have no more or less than one membership. Former law permitted different classes of memberships but forbade the holding of more than one membership. See former Section 9602. The prohibition of holding more than one membership was emasculated by the rule that different classes of memberships could be established with different voting power. See Erickson v. Gospel Foundation of California, 43 Cal.2d 581, 275 P.2d 474 (1954) (by-law permitting one vote for every donation by a member of \$1,000 to the nonprofit corporation in effect created different membership classes). Under subdivision (b), the nonprofit corporation may permit the acquisition of more or less than one membership; where this is done, the nonprofit corporation should also consider special provisions concerning voting rights, benefits and privileges, membership qualifications, and dues and assessments. See Section 5261. See also Section 5704 (voting of membership held by two or more persons).

405/371

§ 5411

Tentatively Approved
February 1976

Renumbered June 1976

§ 5411. Membership classes

5411. (a) A nonprofit corporation shall have such memberships or classes of membership as the bylaws specify and, in the absence of any such classification, there shall be deemed to be but one class.

(b) Unless the bylaws set forth the rule fixing the respective voting, property, and other rights and interests of each member or class of membership, the rights and interests of members shall be equal as to any right or interest not so fixed.

Comment. Section 5411 continues the substance of former Section 9602 with the exception of the prohibition of a member holding more than one membership, which is superseded by Section 5410.

405/406

§ 5412

Tentatively Approved
February 1976

Renumbered June 1976

§ 5412. Directors as members

5412. Where the bylaws of a nonprofit corporation do not provide for members or where the nonprofit corporation has in fact no members, the directors are, for the purpose of any law relating to nonprofit corporations, the members of the nonprofit corporation and shall exercise all the rights and powers of members.

Comment. Section 5412 continues the substance of former Section 9603. See Coon v. Freeman, 1 Cal.3d 542, 463 P.2d 441, 83 Cal. Rptr. 217 (1970).

405/407

§ 5413

Tentatively Approved
February 1976

Renumbered June 1976

§ 5413. Reduction of members below stated number

5413. (a) If the members of a nonprofit corporation having a stated number of members are reduced below that number by death, withdrawal, or otherwise, the nonprofit corporation shall not be dissolved for that reason.

(b) Unless the bylaws provide otherwise, the surviving or continuing members may, in the absence of a quorum, by majority vote of the surviving or continuing members fill vacancies and continue the corporate existence.

Comment. Section 5413 continues the substance of former Section 9605 with the addition of the words "by majority vote of the surviving or continuing members" to make clear that only a majority of the remaining members may fill vacancies and continue the corporate existence.

405/409

§ 5414

Substance Tentatively
Approved February 1976

Renumbered June 1976

§ 5414. Membership certificates

5414. (a) Membership in a nonprofit corporation may be evidenced by a certificate.

(b) A statement that the nonprofit corporation is not one for

profit shall be printed in clear type upon the face of each membership certificate which is transferable and which represents a property interest in the nonprofit corporation.

Comment. Section 5414 continues the substance of former Section 9607, making clear that the limitation of subdivision (b) applies only to certificates that represent a property interest.

404/305

§ 5415

Staff Draft June 1976

§ 5415: Surrender and exchange for new certificate

5415. (a) When the articles or bylaws are amended in a way affecting the statements contained in a membership certificate, if any, or it becomes desirable for any reason, in the discretion of the board, to cancel a membership certificate and issue a new certificate conforming to the rights of the holder, the board may order a holder of a membership certificate to surrender and exchange it for a new certificate within a reasonable time to be fixed by the board.

(b) The order of the board may provide that a holder of a membership certificate ordered to be surrendered is not entitled to vote or exercise any of the other rights of members until the holder has complied with the order, but the order operates to suspend such rights only after notice and until compliance. The duty of surrender of a membership certificate may also be enforced by civil action.

Comment. Section 5415 is the same in substance as Section 422 (General Corporation Law) and former Section 2407.

Staff Draft June 1976

§ 5416. Options

5416. (a) A nonprofit corporation may grant an option to purchase or subscribe for a membership upon such terms and conditions as are deemed expedient either in connection with or independent of the issuance, subscription, or sale of a membership, evidence of indebtedness, or other security.

(b) Unless the bylaws provide otherwise, an option is not transferable but may be separable or inseparable from another security of the nonprofit corporation.

Comment. Subdivision (a) is the same in substance as the first sentence of Section 404 (General Corporation Law). It continues the authorization to grant option rights found in former Sections 1103 and 1104 which were applicable to nonprofit corporations through former Section 9002.

Subdivision (b) is the same in substance as the last sentence of Section 404 (General Corporation Law) and the last sentence of former Section 1104 except that option rights in nonprofit corporations, like memberships, are nontransferable unless the bylaws provide otherwise. See Section 5420 (transfer of membership).

Staff Draft June 1976

§ 5417. Consideration

5417. (a) A membership may be issued for such consideration as is determined by the board or by the members if the bylaws so provide.

(b) Consideration may consist of any or all of the following:

(1) Money paid.

(2) Labor done.

(3) Services actually rendered to or for the benefit of or in the formation, merger, or consolidation of the nonprofit corporation.

(4) Debts or securities canceled.

(5) Tangible or intangible property actually received by the nonprofit corporation.

(c) Neither a promissory note of the member (unless adequately secured by collateral other than the membership acquired) nor an obligation for future services constitutes full or part payment for a membership.

(d) In the absence of fraud in the transaction, the judgment of the board as to the value of the consideration received by the nonprofit corporation is conclusive.

Comment. Subdivisions (a)-(c) of Section 5417 are the same in substance as Section 409(a)(1)(General Corporation Law); it is derived largely from former Section 1109, which was applicable to nonprofit corporations through former Section 9002. Section 5416 differs from former law in that a member's promissory note is no longer valid consideration unless adequately secured by collateral other than the membership itself.

Subdivision (b) is the same in substance as the last sentence of Section 409(b)(General Corporation Law).

Note. If division or conversion procedures are added, reference to them should be made in subdivision (b)(3).

968/894

§ 5418

Staff Draft June 1976

§ 5418. Partly paid memberships

5418. (a) The full agreed consideration for a membership shall be paid prior to or concurrently with the issuance thereof, unless the membership is issued as partly paid pursuant to this section, in which case the consideration shall be paid in accordance with the agreement of subscription or purchase.

(b) A nonprofit corporation may issue the whole or any part of its memberships as partly paid and subject to call for the remainder of the consideration to be paid therefor. The total amount of the consideration to be paid for a partly paid membership and the amount paid thereon shall be stated in the record of members of the nonprofit corporation and on the membership certificate, if any.

Comment. Section 5418 is new.

Subdivision (a) is the same in substance as Section 410(b)(General Corporation Law).

Subdivision (b) is the same in substance as the first two sentences of Section 409(d)(General Corporation Law). See Sections 5414 (membership certificates) and 6510 (required books and records).

101/141

§ 5419

Tentatively Approved
February 1976

Renumbered June 1976

§ 5419. Liability of members

5419. Members of a nonprofit corporation are not personally liable for the debts, liabilities, or obligations of the nonprofit corporation.

Comment. Section 5419 continues the substance of former Section 9610.

Staff Draft June 1976

Article 2. Liability for Unpaid and
Partly Paid Memberships

§ 5420. Liability of member or subscriber

5420. Every subscriber for a membership and every person to whom a membership is originally issued is liable to the nonprofit corporation for the full consideration agreed to be paid for the membership.

Comment. Section 5420 is the same in substance as Section 410(a) (General Corporation Law). It is comparable to former Section 1300, which was applicable to nonprofit corporations through former Section 9002.

Staff Draft June 1976

§ 5421. Partly paid membership; unpaid balance

5421. As used in this article:

(a) "Partly paid membership" means a membership for which the full agreed consideration has not been paid to the issuing nonprofit corporation.

(b) "Unpaid balance" means the portion of the full agreed consideration for a membership which has not been paid to the issuing nonprofit corporation.

Comment. Section 5421 is new.

Staff Draft June 1976

§ 5422. Liability of transferee without knowledge :

5422. (a) A transferee of a partly paid membership is liable only for the unpaid balance shown on the membership certificate, if any, if the transferee acquired the membership in good faith, without knowledge that it was not paid in full or to the extent stated on the membership certificate.

(b) The liability of a holder of a membership who derives title through a transferee described in subdivision (a) and who is not a party to fraud affecting the issuance of the membership is the same as that of the transferee through whom title is derived.

Comment. Subdivision (a) is the same in substance as a portion of the first sentence of Section 411 (General Corporation Law) and former Section 1301, which was applicable to nonprofit corporations through former Section 9002.

Subdivision (b) is the same in substance as the second sentence of Section 411 (General Corporation Law) and the second sentence of former Section 1301, which was applicable to nonprofit corporations through former Section 9002.

Nonprofit corporation memberships need not be transferable or represented by certificates. Sections 5414, 5440. See also Section 5421 (partly paid membership; unpaid balance).

Staff Draft June 1976

§ 5423. Liability of transferee with knowledge

5423. A transferee of a partly paid membership is personally liable to the issuing nonprofit corporation for installments of the unpaid balance becoming due if:

- (a) The transferee acquired the membership under a certificate showing the fact of part payment; or
- (b) The transferee (other than a transferee who derives title through a holder in good faith without knowledge and who is not a party to fraud affecting the issuance of the membership) acquired the membership with actual knowledge that it was partly paid or that payment had not been made to the extent stated on the membership certificate, if any.

Comment. Section 5423 is comparable to the first portion of Section 412 (General Corporation Law) and former Section 1302, which was applicable to nonprofit corporations through former Section 9002.

Nonprofit corporation memberships need not be transferable or represented by certificates. Sections 5414, 5440. See also Sections 5421 (partly paid membership; unpaid balance) and 5424 (discharge of liability of transferee).

Staff Draft June 1976

§ 5424. Discharge of liability of transferee

5424. When the holder of a membership makes a transfer of the membership in good faith, which is duly registered on the books of the nonprofit corporation, to one who becomes liable for the unpaid balance, the transferor is discharged from liability to the nonprofit corporation for the unpaid balance unless it is otherwise agreed by contract in writing or provided in the membership certificate, if any.

Comment. Section 5424 is comparable to the last portion of the first sentence of Section 411 and a portion of Section 412 (General Corporation Law) and the first sentence of former Section 1303, which was applicable to nonprofit corporations through former Section 9002. See Sections 5421 (partly paid membership; unpaid balance), 5422 (liability of transferee without knowledge), and 5423 (liability of transferee with knowledge).

Staff Draft June 1976

§ 5425. Liability of fiduciaries

5425. (a) A person holding a partly paid membership as pledgee, executor, administrator, guardian, trustee, receiver or in any representative or fiduciary capacity is not personally liable for the unpaid balance because the membership is so held.

(b) The estate and funds in the hands of a person described in subdivision (a) are liable for the unpaid balance and the membership is subject to sale therefor.

Comment. Subdivision (a) is the same in substance as the first portion of Section 413 (General Corporation Law), derived from former Section 1304, which was applicable to nonprofit corporations through former Section 9002.

Subdivision (b) is similar to the last portion of Section 413 and the last part of former Section 1304.

See also Sections 5421 (partly paid membership; unpaid balance), 5422 (liability of transferee without knowledge), 5423 (liability of transferee with knowledge), and 5424 (discharge of liability of transferee).

969/036

§ 5426

Staff Draft June 1976

§ 5426. Creditor's remedy

5426. (a) No action shall be brought by or on behalf of a creditor to reach and apply the liability, if any, of a holder of a partly paid membership to the nonprofit corporation to pay the unpaid balance unless final judgment has been rendered in favor of the creditor against the nonprofit corporation and execution has been returned unsatisfied in whole or in part or unless such proceedings would be useless.

(b) All creditors of the nonprofit corporation, with or without reducing their claims to judgment, may intervene in a creditor's action to reach and apply liability for an unpaid balance, and any or all members who hold partly paid memberships may be joined in such action. Several judgments may be rendered for and against the parties to the action or in favor of a receiver for the benefit of the respective parties thereto.

(c) All amounts paid by a member in an action under this section shall be credited on the unpaid balance due the nonprofit corporation upon the membership.

Comment. Section 5425 is the same in substance as Section 414 (General Corporation Law) and former Section 1306, which was applicable to nonprofit corporations through former Section 9002. See also Sections 5424 (discharge of liability of transferee) and 5425 (liability of fiduciaries).

969/037

§ 5427

Staff Draft June 1976

§ 5427. Effect of provisions

5427. Nothing in this division shall be construed as a derogation of any rights or remedies which a creditor or member has against a member, director, officer, or the nonprofit corporation because of participation in any fraud or illegality practiced upon the creditor or member by any such person or by the nonprofit corporation in connection with the issuance or sale of memberships or other securities or in derogation of any rights which the nonprofit corporation may have by rescission, cancellation, or otherwise because of any fraud or illegality practiced on it by any such person in connection with the issue or sale of memberships or other securities.

Comment. Section 5427 is the same in substance as Section 415 (General Corporation Law) and former Section 1310, which was applicable to nonprofit corporations through former Section 9002.

Staff Draft June 1976

Article 3. Record Date for Determining Members§ 5430. Record date

5430. A nonprofit corporation shall have a record date, fixed as provided in this article, to determine the members entitled to:

- (a) Notice of a meeting.
- (b) Vote.
- (c) Receive an allotment of rights.
- (d) Exercise rights in respect of any other lawful action.

Comment. Section 5430 is new. For a comparable provision, see the first portion of Section 701(a)(General Corporation Law).

This article supersedes provisions of former Sections 2214 and 2215 which were applicable to nonprofit corporations through former Section 9002.

406/205

§ 5431

Staff Draft June 1976

§ 5431. Authority of board to fix record date

5431. (a) The board may fix, in advance, the record date.
- (b) The record date fixed by the board shall be:
- (1) In the case of a meeting, not more than 60 nor less than 10 days prior to the date of the meeting.
 - (2) In the case of any other action, not more than 60 days prior to the action.

Comment. Section 5431 is the same in substance as the last portion of Section 701(a)(General Corporation Law). It supersedes a portion of former Section 2214, which was applicable to nonprofit corporations through former Section 9002, extending the permissible record date from 50 to 60 days prior to the event to which its relates, and adding a 10-day cutoff prior to meetings of members.

968/859

§ 5432

Staff Draft June 1976

§ 5432. Record date where board does not fix date

5432. If no record date is fixed by the board:

(1) The record date for determining members entitled to notice of or to vote at a meeting of members is the close of business on the business day next preceding the day on which notice is given or, if notice is waived, the close of business on the business day next preceding the day on which the meeting is held.

(2) The record date for determining members entitled to give consent to corporate action in writing without a meeting, when no prior action by the board has been taken, is the day on which the first written consent is given.

(3) The record date for determining members for any other purpose is the close of business on the day on which the board adopts the resolution relating thereto or the 60th day prior to the date of the other action, whichever is later.

Comment. Section 5432 is the same in substance as Section 701(b) (General Corporation Law). It is new to nonprofit corporation law.

Staff Draft June 1976

§ 5433. Record date for adjourned meeting.

5433. The record date for determination of members entitled to notice of or to vote at a meeting of members applies to an adjournment of the meeting unless:

- (a) The board fixes a new record date for the adjourned meeting.
- (b) The meeting is adjourned for more than 45 days from the date set for the original meeting, in which case the board shall fix a new record date for the adjourned meeting.

Comment. Section 5433 is the same in substance as Section 701(c) (General Corporation Law). It is new to nonprofit corporation law.

Staff Draft June 1976

§ 5434. Effect of record date on rights of members

5434. Except as otherwise provided in the bylaws, notwithstanding the acquisition, transfer, or termination of the membership on the books of the nonprofit corporation after the record date, a member on the record date is entitled, as the case may be, to:

- (a) Notice of the meeting.
- (b) Vote.
- (c) Receive the allotment of rights.
- (d) Exercise the rights in respect of any other lawful action.

Comment. Section 5434 is comparable to Section 701(d) (General Corporation Law); it supersedes portions of former Sections 2214 and 2215, which were applicable to nonprofit corporations through former Section 9002.

Under Section 5434, the bylaws may provide, notwithstanding the establishment of a record date, for example, that members admitted after the record date may vote and that persons no longer members after the record date may not vote.

Tentatively Approved
February 1976

Renumbered June 1976

Article 4. Transfer and Termination

§ 5440. Transfer of membership

5440. (a) No member may transfer the membership or any right arising therefrom unless the bylaws so provide.

(b) Where the bylaws provide for transfer of the membership or any right arising therefrom, the bylaws may also provide that the nonprofit corporation is not bound by the transfer until notice is received in the manner specified in the bylaws.

Comment. Subdivision (a) of Section 5440 continues the substance of former Section 9609.

Subdivision (b) is new; it enables the nonprofit corporation to keep its membership list updated.

Staff Draft June 1976

§ 5441. Termination of membership

5441. (a) Subject to the provisions of this section, memberships may be terminated in the manner provided in the bylaws.

(b) Unless the bylaws provide otherwise, a membership terminates on the death of the member.

(c) No member shall be expelled from a nonprofit corporation with-

out due notice and reasonable opportunity to be heard except in the event of termination of membership pursuant to subdivision (d) of Section 5500.

Comment. Subdivision (a) continues the substance of the first sentence of former Section 9608.

Subdivision (b) continues the substance of a portion of the second sentence of former Section 9608.

Subdivision (c) is new. California courts have long required minimal due process for expulsion proceedings. Otto v. Tailors' P. & B. Union, 75 Cal. 308 (1883); Taboada v. Sociedad Espanola, etc., 191 Cal. 187 (1923). The nature of the nonprofit corporation and the extent of the member's interest involved will determine the minimum standards of notice and hearing which must be followed. Erickson v. Gospel Foundation of California, 43 Cal.2d 581 (1954).

Termination of membership because of the nonpayment of dues or other proper financial burdens of membership normally requires only reasonable notice without the opportunity of a hearing. Section 5500(d); DeMille v. American Fed. of Radio Artists, 31 Cal.2d 139 (1947); see also Pa. Stat. Ann. tit. 15, §§ 7545(c) and 7767(b)(1972).

045/212

§ 5442

Staff Draft June 1976

§ 5442. Termination of rights

5442. (a) Unless the bylaws provide otherwise and except as provided in subdivision (b), all rights of a member in the nonprofit corporation or in its property cease upon termination of membership for any reason.

(b) Unless the bylaws provide otherwise, termination of membership by reason of death shall be without prejudice to the member's property interests, if any, in the nonprofit corporation or its property.

Comment. Subdivision (a) continues the substance of a portion of the second sentence of former Section 9608 for all situations not involving the death of a member.

Subdivision (b) is new. This subdivision requires the nonprofit corporation to set forth in its bylaws any deprivation of property rights resulting from death. In the absence of such a provision, the member's heirs or other successors, although not entitled to continued membership in the corporation or benefits associated with membership, will retain all of the deceased member's property interests, such as the right to a share of corporate assets upon dissolution or the right to require repurchase of the membership by the corporation.

101/140

§ 5443

Substance Tentatively
Approved February 1976

Renumbered June 1976

§ 5443. Withdrawal of members

5443. (a) Unless the bylaws provide a procedure for withdrawal of members, a member may surrender membership upon 30 days' written notice to the nonprofit corporation.

(b) Unless the bylaws provide otherwise, surrender of membership terminates all future rights, powers, and obligations of the membership, but it does not terminate the member's liability for dues, assessments, fees of admission, and charges incurred prior to surrender.

Comment. Section 5443 is new. It codifies the holding in Haynes v. Annandale Golf Club, 4 Cal.2d 28, 47 P.2d 470 (1935) (nonprofit organization may impose only reasonable restrictions on a member's right to resign), and provides a procedure for resignation in the absence of a procedure in the bylaws.

404/181

§ 5444

Staff Draft June 1976

§ 5444. Liability for transfer

5444. Neither a domestic nor foreign nonprofit corporation nor its transfer agent or registrar is liable:

(a) For transferring or causing to be transferred on the books of the nonprofit corporation to the surviving joint tenant or tenants a membership or other security issued to two or more persons in joint tenancy, whether or not the transfer is made with actual or constructive knowledge of the existence of an understanding, agreement, condition, or evidence that the membership or security was held other than in joint tenancy or of a breach of trust by a joint tenant.

(b) To a minor or incompetent person in whose name a membership is of record on its books or to any transferee of or transferor to either for transferring the membership on its books at the instance of or to the minor or incompetent or for the recognition of or dealing with the minor or incompetent as a member, whether or not the nonprofit corporation, transfer agent, or registrar had notice, actual or constructive,

of the nonage or incompetency, unless a guardian or conservator of the property of the minor or incompetent has been appointed and the non-profit corporation, transfer agent, or registrar has received written notice thereof.

(c) To a married person or to a transferee of a married person for transferring a membership on its books at the instance of the person in whose name it is registered, without the signature of the married person's spouse and regardless of whether the registration indicates that the membership is community property, in the same manner as if the married person were unmarried. Section 5125 of the Civil Code shall be subject to the provisions of this subdivision and shall not be construed to prevent transfers, or result in liability to the nonprofit corporation, transfer agent, or registrar permitting or effecting transfers, which comply with this section.

Comment. Section 5444 is the same in substance as Section 420 (General Corporation Law), which is derived from former Sections 2413, 2414, and 2415.

CHAPTER 5. CORPORATE FINANCE

[Major portion not included--See Memorandum 76-42, May 1976 Meeting]

Tentatively Approved
February 1976

CHAPTER 5. CORPORATE FINANCE

Article 1. General Provisions

§ 5510. Levy of dues and assessments

5510. (a) The bylaws may authorize dues or assessments or both to be levied upon all members or classes of membership alike, or in different amounts or proportions or upon a different basis upon different members or classes of membership and may exempt some members or classes of membership from either dues or assessments or both.

(b) The bylaws may fix the amount and method of collection of dues or assessments or both, or may authorize the board to fix the amount thereof from time to time, and make them payable at such times or intervals and upon such notice and by such methods as the board may prescribe.

(c) The bylaws may fix the amount and method of collection of charges owed to the nonprofit corporation.

(d) Dues, assessments, or charges, or all of them, may be made enforceable by action or by sale or forfeiture of membership, or both, upon reasonable notice.

Comment. Section 5510 augments Sections 5261(j) (liability of members to dues and assessments) and 5410 (authority of nonprofit corporations to levy dues and assessments).

Subdivision (a) continues the substance of the third sentence of former Section 9301.

Subdivision (b) continues the substance of the fourth sentence of former Section 9301.

Subdivision (c) is new.

Subdivision (d) continues the substance of the last sentence of former Section 9301 with the addition of a provision for the collection

of charges owed to the nonprofit corporation in the manner of dues or assessments.

Note. The staff has not yet drafted provisions to permit members to avoid the effect of unduly burdensome assessments by withdrawal or otherwise.

404/109

§ 5520

Not Approved; See Minutes
February 1976

§ 5520. Attorney General supervision of trust property

5520. (a) A nonprofit corporation which holds property subject to any charitable trust is subject at all times to examination by the Attorney General, on behalf of the state, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may have departed from the general purposes for which it is formed.

(b) In case of any such failure or departure, the Attorney General shall institute, in the name of the state, the proceedings necessary to correct the noncompliance or departure.

Comment. Section 5520 continues former Section 9505.

Note. Section 10207 (charitable and eleemosynary corporations) is a comparable provision which we will dispose of when we consider the other provisions of Part 3 (commencing with Section 10200).

The staff has not yet reviewed this section for coordination with the Uniform Supervision of Trustees for Charitable Purposes Act, nor has it considered whether it should be expanded to refer to business corporations or how it should be revised for clarity.

The Comment has not yet been revised to indicate that the deletion of "public trust" does not alter existing law or to refer to cases broadly construing the meaning of "charitable trust."

404/082

§ 5610

Tentatively Approved
April 1976

CHAPTER 6. MEMBERS' MEETINGS AND CONSENTS

Article 1. Meetings

§ 5610. Place of meeting

5610. (a) Meetings of members may be held at a place within or without the state that is stated in or fixed in accordance with the bylaws.

(b) If no other place is stated or so fixed, member meetings shall be held at the principal executive office of the nonprofit corporation.

Comment. Section 5610 is the same in substance as Section 600(a) (General Corporation Law). It supersedes a portion of former Section 2200 and the first sentence of former Section 2210, which were applicable to nonprofit corporations through former Section 9002. See also Section 5264 (bylaws relating to meetings).

Under subdivision (a), the bylaws may provide a manner in which the meeting place is fixed, such as by resolution of the board or in the notice of the meeting.

404/400

§ 5611

Tentatively Approved
April 1976

§ 5611. Annual meeting

5611. (a) Unless otherwise provided in the bylaws, an annual meeting of members shall be held for the election of directors. Any

other proper business may be transacted at the annual meeting.

(b) The annual meeting shall be held on a date and at a time stated in or fixed in accordance with the bylaws.

Comment. Section 5611 is the same in substance as Section 5610(b) (General Corporation Law).

Subdivision (a) continues portions of former Section 2201, which was applicable to nonprofit corporations through former Section 9002. See Burnett v. Banks, 130 Cal. App.2d 631, 279 P.2d 579 (1955). If business other than election of directors is to be transacted at the annual meeting, notice thereof must be given. Section 5622.

Subdivision (b) supersedes former Section 2200, which was applicable to nonprofit corporations through former Section 9002 and which provided an annual meeting at 11:00 a.m. on the first Tuesday in April, unless otherwise provided in the bylaws. See also Section 5264 (bylaws relating to meetings).

404/401

§ 5612

Not Approved; See Minutes
April 1976

§ 5612. Failure to hold annual meeting

5612. (a) If a nonprofit corporation which is required by law or its bylaws to hold an annual meeting fails to hold the annual meeting for a period of 60 days after the date designated therefor or, if no date has been designated, for a period of 15 months after the organization of the nonprofit corporation or after its last annual meeting, the superior court of the proper county may summarily order a meeting to be held upon the application of 50 members or 10 percent of the members,

whichever is smaller, after notice to the nonprofit corporation giving it an opportunity to be heard.

(b) The memberships represented at the meeting, either in person or by proxy, and entitled to vote thereat, shall constitute a quorum for the purpose of the meeting, notwithstanding any provision of the articles or bylaws or in this division to the contrary.

(c) The court may issue such orders as may be appropriate including, without limitation, orders designating the time and place of the meeting, the record date for determination of members entitled to vote, and the form of notice of the meeting.

Comment. Section 5612 is the same in substance as Section 600(c) (General Corporation Law). It is new to nonprofit corporation law. Subdivision (a) differs from Section 600(c) in that a single member may not require the annual meeting to be held. Subdivision (b) supersedes the quorum provisions of Section 5614. Subdivision (c) supersedes the time and place provisions of Sections 5610 and 5611, the notice provisions of Article 2 (commencing with Section 5620), and the record date provisions of Section 5701.

Note. The possibility of providing a general enforcement procedure that would indicate the matters that could be considered at the meeting and that could be used in place of this section is under investigation by the staff.

Tentatively Approved
April 1976

§ 5613. Special meetings

5613. (a) A special meeting of the members may be called by any of the following:

- (1) The board.
- (2) The chairman of the board.
- (3) The president.
- (4) Members entitled to cast not less than 10 percent of the votes on the business to be transacted at the meeting.
- (5) Such other persons as provided in the bylaws.

(b) A special meeting may be called for any purpose, but the only business that may be transacted is that which is stated in the notice of the meeting.

Comment. Subdivision (a) of Section 5613 is the same in substance as Section 600(d)(General Corporation Law). It continues former Section 9600 and, in addition, permits special meetings to be called by the chairman of the board, the president, and other persons designated in the bylaws. See also Section 5264 (bylaws relating to meetings).

Subdivision (b) is new. For the contents of the notice of the meeting, see Section 5622.

404/676

§ 5614

Tentatively Approved
April 1976

§ 5614. Quorum

5614. (a) Unless otherwise provided in the bylaws, a majority of the members represented at the meeting and entitled to vote on the business to be transacted constitutes a quorum at a meeting of members.

(b) The bylaws may provide that a quorum of members is greater or less than a majority.

Comment. Subdivision (a) of Section 5614 is comparable to a portion of the first sentence of Section 602(a) (General Corporation Law). Subdivision (b) continues a portion of former Section 9401(b). See also former Section 2211.

404/975

§ 5615

Tentatively Approved
April 1976

§ 5615. Vote required

5615. Except as provided in Section 5617, if a quorum is present, the affirmative vote of a majority of the votes represented at the meeting and entitled to be cast on the matter shall be the act of the members unless the vote of a greater number or voting by classes is required by this division or the bylaws.

Comment. Section 5615 is comparable to the second sentence of Section 602(a) (General Corporation Law). The vote on any matter is subject to proper notice requirements pursuant to Sections 5620-5628.

999/557

§ 5616

Tentatively Approved
April 1976

§ 5616. Adjournment absent a quorum

5616. Except as provided in Section 5617, in the absence of a quorum, any meeting of members may be adjourned from time to time by the vote of a majority of the votes represented at the meeting and entitled to be cast on the matter, but no other business may be transacted.

Comment. Section 5616 is the same in substance as Section 602(c) (General Corporation Law). It continues provisions of former Section 2213 which were applicable to nonprofit corporations through former Section 9002.

045/222

§ 5617

Tentatively Approved
April 1976

§ 5617. Vote required absent a quorum

5617. The members present at a meeting duly called or held at which a quorum is present may continue to transact business until adjournment notwithstanding the withdrawal of enough members to leave less than a quorum if any action taken (other than adjournment) is approved by at least a majority of the votes required to constitute a quorum.

Comment. Section 5617 is the same in substance as Section 602(b) (General Corporation Law). It continues provisions of former Section 2212, which were applicable to nonprofit corporations through former Section 9002, and adds the requirement of the vote necessary to take action.

045/223

§ 5620

Substance Tentatively Approved
April 1976

Article 2. Notice of Meetings

§ 5620. When notice required

5620. (a) Whenever members are required or permitted to take action at a meeting, notice of the meeting shall be given in the manner provided in this article.

(b) Notwithstanding any other provision of this article, the bylaws of a nonprofit corporation may prescribe reasonable notice requirements.

Comment. Subdivision (a) of Section 5620 is comparable to the first sentence of Section 601(a)(General Corporation Law).

Subdivision (b) continues former Section 9401(a). Whether a particular bylaw provides a reasonable notice requirement depends on all the circumstances of the particular case including, but not limited to, the number of members and their location.

045/224

§ 5621

Tentatively Approved
April 1976

§ 5621. Time of notice

5621. The notice of the meeting shall be given not less than 10 nor more than 60 days before the date of the meeting.

Comment. Section 5621 is the same in substance as a portion of the first sentence of Section 601(a)(General Corporation Law). It supersedes former Section 2206, which was applicable to nonprofit corpora-

tions through former Section 9002, and required notice seven days before the meeting unless the bylaws provided otherwise. It should be noted that the bylaws may prescribe reasonable requirements for the time of notice. Section 5620(b).

045/225

§ 5622

Tentatively Approved
April 1976

§ 5622. Contents of notice

5622. The notice of the meeting shall state all of the following:

- (a) The place of the meeting.
- (b) The date and hour of the meeting.
- (c) In the case of a special meeting, the general nature of the business to be transacted and that no other business may be transacted.
- (d) In the case of the annual or a regular meeting, those matters which the board, at the time of the notice, intends to present for action by the members but that, subject to the provisions of Section 5628, any proper matter may be presented at the meeting for action by the members.
- (e) The notice of a meeting at which directors are to be elected shall include the names of nominees known to the board at the time of the notice.

Comment. Section 5622 is the same in substance as the last two sentences of Section 601(a)(General Corporation Law) except that the notice must include names of all nominees, not just those presented by management. Subdivisions (a) and (b) continue provisions of former

Section 2207, which were applicable to nonprofit corporations through former Section 9002. Subdivisions (c)-(e) supersede the provisions of former Section 2207 that required the notice of meeting to state the general nature of the business to be transacted.

Under subdivision (d), whether matter presented at a meeting is proper for action by the members is determined by reference to the provisions of this division and to the bylaws. It should be noted that the bylaws may prescribe reasonable requirements for the contents of notice. Section 5620(b).

101/151

§ 5623

Tentatively Approved
April 1976

§ 5623. Manner of giving notice

5623. (a) Notice of a members' meeting shall be given either personally or by mail or other means of written communication, addressed to the member at the address of the member appearing on the books of the nonprofit corporation or given by the member to the nonprofit corporation for the purpose of notice.

(b) If no address of the member appears or is given, or if the notice is returned to the nonprofit corporation marked by the United States Postal Service to indicate that it is unable to deliver the notice to the member at the address of the member, notice shall be posted and shall be available at the principal executive office of the nonprofit corporation.

(c) The notice shall be deemed to have been given at the time when

delivered personally or deposited in the mail or sent by other means of written communication.

(d) An affidavit of the giving of notice in accordance with this section, executed by the secretary or an assistant secretary, is prima facie evidence of the giving of the notice.

Comment. Section 5623 is comparable to Section 601(b) (General Corporation Law). It supersedes former Section 2205, which was applicable to nonprofit corporations through former Section 9002. See also Section 5264 (bylaws relating to meetings). Unlike the General Corporation Law provision, Section 5623 does not permit notice of the meetings of a nonprofit corporation by publication nor does it deal with the manner of giving reports.

The mail requirement of Section 5623 refers to first-class mail, postage prepaid. See Section 5113. The provision for other means of written communication includes, but is not limited to, facsimile and telegraphic communication. See Section 5195. It should be noted that the bylaws may prescribe reasonable requirements for the manner of giving notice. Section 5620(b).

968/997

§ 5624

Staff Draft

§ 5624. Persons to whom notice given

5624. Notice of a meeting shall be given to members entitled to vote on the business to be transacted at the meeting.

Comment. Section 5624 is the same in substance as a portion of the first sentences of Section 601(a) and (c) (General Corporation Law). It should be noted that the bylaws may prescribe reasonable requirements for the persons to whom notice is given. Section 5620(b).

Not Approved; See Minutes
April 1976

§ 5625. Notice of special meeting

5625. (a) Upon request in writing to the chairman of the board, president, vice president, or secretary by the members or other persons provided in the bylaws entitled to call a special meeting of members, the officer forthwith shall cause notice to be given in the manner provided in this article that a meeting will be held at a time requested by the person calling the meeting, not less than 35 nor more than 60 days after receipt of the request.

(b) If the notice is not given within 20 days after receipt of the request, the person entitled to call the meeting may do either of the following:

(1) Give notice of the meeting.

(2) Under the procedure provided in [Section 305(c)], apply to the superior court of the proper county for, and the court shall summarily order the giving of, the notice. The court may issue such orders as may be appropriate, including without limitation, orders designating the time and place of the meeting, the record date for determination of members entitled to vote, and the form of notice.

Comment. Section 5625 is the same in substance as Section 601(c) (General Corporation Law). It continues provisions of former Section 2203, which were applicable to nonprofit corporations through former Section 9002, with changes to: (1) permit a request for a special meeting to be made on the chairman of the board; (2) increase the time within which the meeting must be held and within which the nonprofit corporation must respond in order to enable the nonprofit corporation to

prepare proxy materials; and (3) permit a member to obtain a court order for notice in recognition of the fact that member lists may not be accessible to the person calling the meeting.

It should be noted that the bylaws may prescribe reasonable requirements for notice of special meetings. Section 5620(b).

Note. The staff has not yet drafted provisions comparable to Section 305(c). The Commission has tentatively determined to provide a single uniform court enforcement provision, which will be incorporated by reference in this section.

101/153

§ 5626

Tentatively Approved
April 1976

§ 5626. Notice of adjourned meeting

5626. (a) Except as provided in subdivision (b), when a members' meeting is adjourned to another time or place, notice need not be given of the adjourned meeting if the time and place are announced at the meeting at which the adjournment is taken. At the adjourned meeting, the members may transact any business that might have been transacted at the original meeting.

(b) If the adjournment is for more than 45 days or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to each member of record entitled to vote at the meeting.

Comment. Section 5626 is the same in substance as Section 601(d) (General Corporation Law). It continues provisions of former Section 2208, which were applicable to nonprofit corporations through former

Section 9002, but extends the length of time for adjournment without notice from 30 to 45 days. It should be noted that the bylaws may prescribe reasonable requirements for notice of adjourned meetings.

Section 5620(b).

101/154

§ 5627

Tentatively Approved
April 1976

§ 5627. Validation of defectively noticed meeting

5627. (a) The transactions of a meeting of members, however called and noticed and wherever held, are as valid as though had at a meeting duly held after regular call and notice if all of the following conditions are satisfied:

(1) A quorum is present.

(2) Either before or after the meeting, each member entitled to vote who was not represented at the meeting signs a written waiver of notice, a consent to the holding of the meeting, or an approval of the minutes of the meeting. Neither the business to be transacted at nor the purpose of any regular or special meeting of members need be specified in a written waiver of notice unless otherwise required by Section 5628.

(3) All waivers, consents, and approvals are filed with the corporate records or made a part of the minutes of the meeting.

(b) Attendance of a person at a meeting constitutes a waiver of notice of the meeting except in either of the following cases:

(1) The person objects, at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened.

(2) The person expressly objects at the meeting to the consideration of matters not included in the notice.

Comment. Section 5627 is the same in substance as Section 601(e) (General Corporation Law). It supersedes provisions of former Sections 2209 and 2210, which were applicable to nonprofit corporations through former Section 9002. It should be noted that the bylaws may prescribe reasonable requirements for validation of a defectively noticed meeting. Section 5620(b).

101/155

§ 5628

Tentatively Approved
April 1976

§ 5628. Notice required for approval of specific proposals

5628. Notwithstanding any provision of the bylaws, any member approval at a meeting, pursuant to Sections [310, 902, 1201, 1900, or 2007], other than unanimous approval by those entitled to vote is valid only if the general nature of the proposal so approved was stated in the notice of meeting or in a written waiver of notice.

Comment. Section 5628 is the same in substance as Section 601(f) (General Corporation Law). It supersedes provisions of former Section 2201, which were applicable to nonprofit corporations through former Section 9002. Section 5620(b), permitting bylaws to prescribe reasonable notice requirements, does not permit waiver of the notice requirement of this section.

Note. The staff has not yet reviewed and drafted comparable sections to replace those referred to in this section.

Tentatively Approved
April 1976

Article 3. Consents

§ 5630. Consent to action without a meeting and prior notice

5630. Unless otherwise provided in the bylaws, any action which may be taken at a meeting of members may be taken without a meeting and without prior notice if consent in writing, setting forth the action so taken, is signed by members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all members entitled to vote thereon were present and voted.

Comment. Section 5630 is the same in substance as Section 603(a) (General Corporation Law). It supersedes provisions of former Section 2239, which applied to nonprofit corporations through former Section 9002. Section 5630 reduces the former requirement of unanimous consent, subject to the provisions of Sections 5631-5633.

Note. The Commission has tentatively determined to permit membership action by means other than vote at a meeting or written consent. The staff has not yet drafted provisions for alternative means of voting.

Tentatively Approved
April 1976

§ 5631. Notice required for consent

5631. (a) Unless consent of all members entitled to vote on the matter has been solicited in writing, notice of a corporate action

approved by members without a meeting shall be given in the manner provided in Section 5623 to those members entitled to vote on the matter who have not consented in writing.

(b) The notice required by subdivision (a) shall be given:

(1) At least 10 days before the consummation of an action approved by the members pursuant to Section [310, 317, 1201, or 2007].

(2) Promptly after the taking of any other corporate action.

Comment. Section 5631 is the same in substance as Section 603(b) (General Corporation Law). It is new to nonprofit corporation law.

Note. The staff has not yet reviewed and drafted comparable provisions to replace those referred to in this section.

101/158

§ 5632

Tentatively Approved
April 1976

§ 5632. Revocation of consent

5632. (a) A written consent may be revoked by the member giving the consent, a transferee of the membership, a personal representative of the member, or the proxyholder of the member, transferee, or personal representative.

(b) The revocation shall be in writing and is effective upon its receipt by the secretary of the nonprofit corporation.

(c) A revocation may be made prior to the time that written consents by the number of members required to authorize the proposed action

have been filed with the secretary of the nonprofit corporation but not thereafter.

Comment. Section 5632 is the same in substance as Section 603(c) (General Corporation Law). It continues provisions of former Section 2217 which were applicable to nonprofit corporations through former Section 9002.

101/159

§ 5633

Not Approved; See Minutes
April 1976

§ 5633. Consents required to elect directors

5633. Notwithstanding Section 5630, directors may not be elected by written consent except by unanimous written consent of all members entitled to vote for the election of directors.

Comment. Section 5633 is the same in substance as Section 603(d) (General Corporation Law). It is new to nonprofit corporation law.

Note. The staff has not yet ascertained whether this section is appropriate for nonprofit corporations.

Not Approved; See Minutes
April 1976

Article 4. Form of Proxy or Written Consent

§ 5640. Form of proxy or written consent

5640. (a) A form of proxy or written consent shall afford an opportunity on the form to specify as to each matter or group of matters (other than election to office) for which the proxy or written consent is solicited, a choice among approval, disapproval, or abatement.

Where the person solicited specifies a choice, the membership shall be voted in accordance therewith.

(b) In an election of directors, a form of proxy in which the candidates are named and which is marked by a member "withhold" or otherwise marked in a manner indicating that the authority to vote for the election of directors is withheld, shall not be voted either for or against the election of a director.

(c) Failure to comply with this section shall not invalidate any corporate action taken but may be the basis for challenging any proxy or written consent, and the superior court may compel compliance therewith at the suit of any member.

Comment. Section 5640 is comparable to Section 604 (General Corporation Law) except that it applies to all nonprofit corporations. It supersedes former Section 2225.5 which was applicable to nonprofit corporations through former Section 9002.

Note. This section is to be split into separate provisions relating to proxies and written consents. The section should make clear that a general proxy is not prohibited.

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Tentatively Approved March 1976
Renumbered June 1976

CHAPTER 7. VOTING OF MEMBERSHIPS

Article 1. General Provisions

§ 5710. Voting rights

5710. Unless the bylaws provide otherwise, every member of a nonprofit corporation is entitled to one vote.

Comment. Section 5710 continues a portion of the first sentence of former Section 9601. For a comparable provision, see Section 700(a) (General Corporation Law). Although the established norm for nonprofit corporations is one vote per member (see Green Gables Home Owner's Ass'n v. Sunlite Homes, 202 P.2d 143 (1949)), the bylaws may provide different classes of membership with differing voting rights (see Section 5261; see also Erickson v. Gospel Foundation, 43 Cal.2d 581, 275 P.2d 474 (1954)). Absent a specification of the rules fixing the respective voting rights of each member or class of members, the voting rights of members are equal. Section 5401.

Tentatively Approved March 1976
Renumbered June 1976

§ 5711. Manner of voting

5711. The manner of voting of members may be:

(a) At a meeting or by written consent pursuant to Chapter 6 (commencing with Section 5610).

(b) By mail or any reasonable means provided in the bylaws.

Comment. Section 5711 continues the second sentence of former Section 9601. It makes clear that the bylaws may provide any reasonable means or combination of means of voting but, absent such provision, the requirements of Chapter 6 (Members' Meetings and Consents) control.

404/942

§ 5712

Staff Draft June 1976

§ 5712. Persons entitled to take member action

5712. An action required or permitted by this division to be taken by the members shall be taken by the voting members and such additional persons as are specifically authorized by the bylaws to take the action.

Comment. Section 5712 is new. The term "voting members" is defined in Section 5194.3 (members entitled to vote for directors). Unless the bylaws provide otherwise, all members of a nonprofit corporation are voting members. See Sections 5411(b) (rights of members equal) and 5710 (voting rights).

404/943

§ 5713

Staff Draft June 1976

§ 5713. Vote required for member action

5713. (a) Unless this division, or the bylaws require a greater vote or a class vote, an action required by this division to be approved by the members shall be approved by:

(1) If the approval is at a meeting duly held at which a quorum is present, a majority of the votes represented at the meeting and entitled to be cast on the action.

(2) If the approval is by written consent or by mail or any reasonable means provided in the bylaws, a majority of the votes entitled to be cast on the action.

(b) If this division or the bylaws require a greater vote than that prescribed in subdivision (a), an action required by this division to be approved by the members shall be approved by such greater vote.

(c) If this division or the bylaws require a class vote, an action required by this division to be approved by the members shall be approved both by the members and by the class.

Comment. Section 5713 is new. It applies to adoption, amendment, or repeal of bylaws as well as to other corporate actions. The bylaws may require a greater vote than that prescribed by subdivision (a) or voting by class. Section 5714. This division requires voting by class in certain circumstances. Section 5715. This division requires a greater vote than that prescribed in subdivision (a) in the following sections: [to be supplied].

406/169

§ 5714

Staff Draft June 1976

§ 5714. Bylaws may require greater or class vote

5714. (a) The bylaws may require a greater vote than is otherwise required by this division for an action required by this division to be approved by the members.

(b) The bylaws may require a class vote for an action required by this division to be approved by the members.

Comment. Section 5714 is new; for a comparable provision, see Section 204(a)(5) (General Corporation Law), which requires the articles to state a greater class vote. Where the bylaws require a greater vote than is otherwise required by this division, the requirement of the bylaws prevails. Section 5713(b). Where the bylaws require voting by classes, the class vote is in addition to the general requirement of membership approval. Section 5713(c).

368/244

§ 5715

Tentatively Approved March 1976
Staff Revision June 1976

§ 5715. When class vote required

5715. Notwithstanding any other provision of this division, an action required by this division to be approved by the members shall be approved by not less than a majority vote of a class, whether or not the class is otherwise entitled to vote thereon, if the action would adversely affect the property, voting, or other rights or interests of the class to a greater extent than other classes.

Comment. Section 5715 is new; for a comparable provision, see Section 903 (General Corporation Law). Section 5715 requires a class vote in cases where any action, including adoption, amendment, or repeal of bylaws, would adversely affect members of a particular class to a greater extent than members of other classes. Such an action might have an adverse effect either directly through restrictions on class rights and

privileges or indirectly through increase of rights and privileges of other classes or creation of new memberships that will have the effect of diluting the rights of the class members.

It should be noted that class approval of adverse actions is not alone sufficient for approval of the actions. The actions must meet the other statutory requirements for approval. See Section 5713 (vote required for member action).

406/231

§ 5716

Staff Draft June 1976

§ 5716. Disqualified votes

5716. If a vote is disqualified from being cast on an action required by this division to be approved by the members, the vote shall not be considered for the determination of a quorum at a meeting to approve, or the required vote to approve, the action.

Comment. Section 5716 is new; for a comparable provision, see Section 112 (General Corporation Law).

406/232

§ 5717

Staff Draft June 1976

§ 5717. Approval by board in lieu of approval by members

5717. If an action is required by this division to be approved by the members and there are no votes entitled to be cast on the action,

the action may be approved by the board without approval of the members.

Comment. Section 5717 is new; for a comparable provision, see Section 5402 (directors as members).

406/233

§ 5718

Staff Draft June 1976

§ 5718. Additional vote required by bylaws

5718. (a) The bylaws may require the approval of the members for an action not required by this division to be approved by the members.

(b) Unless the bylaws provide otherwise, the provisions of this article that relate to an action required by this division to be approved by the members apply to an action for which the bylaws require the approval of the members.

Comment. Section 5718 is new; for a comparable provision, see Section 204(a)(9) (General Corporation Law), which requires the articles to impose shareholder approval where not otherwise required.

Staff Draft June 1976

Article 2. Exercise of Voting Rights§ 5720. Voting of membership held by administrator, executor, guardian, conservator, or custodian

5720. A membership held by an administrator, executor, guardian, conservator, or custodian may be voted by the holder without a transfer of the membership into the holder's name.

Comment. Section 5720 is the same in substance as the first sentence of Section 702(a)(General Corporation Law); a person entitled to vote the membership may vote by proxy. Section 5730. Section 5720 supersedes former Sections 2219 and 2220, which were applicable to non-profit corporations through former Section 9002.

Staff Draft June 1976

§ 5721. Voting of membership standing in name of trustee

5721. (a) A membership standing in the name of a trustee may be voted by the trustee.

(b) A trustee may not vote a membership held by the trustee without a transfer of the membership into the trustee's name.

Comment. Section 5721 is the same in substance as the second sentence of Section 702(a)(General Corporation Law); a person entitled to vote the membership may vote by proxy. Section 5730. Section 5721 supersedes a portion of former Section 2218, which was applicable to nonprofit corporations through former Section 9002.

Staff Draft June 1976

§ 5722. Voting of membership standing in name of receiver

5722. (a) A membership standing in the name of a receiver may be voted by the receiver.

(b) A membership held by or under the control of a receiver may be voted by the receiver without a transfer of the membership into the receiver's name if authority to do so is contained in the order of the court by which the receiver was appointed.

Comment. Section 5722 is the same in substance as Section 702(b) (General Corporation Law). It is new to nonprofit corporation law.

Staff Draft June 1976

§ 5723. Voting of membership standing in name of pledgee

5723. Except where otherwise agreed in writing between the parties:

(a) A member whose membership is pledged may vote the membership until the membership has been transferred into the pledgee's name.

(b) After the membership has been transferred into the pledgee's name, the pledgee may vote the membership.

Comment. Section 5723 is the same in substance as Section 702(c) (General Corporation Law); for provisions relating to proxies involving pledged memberships, see Article 3. Section 5723 supersedes a portion of former Section 2218, which was applicable to nonprofit corporations through former Section 9002.

Staff Draft June 1976

§ 5724. Voting of membership standing in name of minor

5724. A membership standing in the name of a minor may be voted, and the nonprofit corporation may treat all rights incident thereto as exercisable, by the minor, whether or not the nonprofit corporation has notice, actual or constructive, of the nonage, unless a guardian of the minor's property has been appointed and written notice of the appointment given to the nonprofit corporation.

Comment. Section 5724 is the same in substance as Section 702(d) (General Corporation Law); a person entitled to vote the membership may vote by proxy. Section 5730. Section 5724 supersedes former Section 2221, which was applicable to nonprofit corporations through former Section 9002.

Tentatively Approved March 1976
Reintroduced June 1976

§ 5725. Voting of membership held by corporation

5725. (a) Unless the bylaws provide otherwise, a membership standing in the name of a business corporation or another nonprofit corporation, domestic or foreign, may be voted by such officer, agent, or proxyholder as the bylaws of the business or other nonprofit corporation prescribe or, in the absence of such provision, as the board of the business or other nonprofit corporation determines or, in the absence of

such determination, by the chairman of the board, president, or any vice president of the business or other nonprofit corporation, or by any other person authorized to do so by such officer.

(b) A membership which is purported to be voted by a business corporation or nonprofit corporation, domestic or foreign (whether or not the title of the person signing is indicated) shall be presumed to be voted in accordance with the provisions of this section unless the contrary is shown.

Comment. Section 5725 is the same in substance as Section 703(a) (General Corporation Law) with the exception of the proxy provisions, which are continued in Section 5731 (execution of proxy). It should be noted that only natural persons may be members of a nonprofit corporation unless the bylaws provide otherwise. Section 5400. Moreover, where a nonprofit corporation allows corporate members, Section 5725 permits the bylaws to require differing voting requirements, such as designation of a voting representative.

Subdivision (a) continues provisions applicable to nonprofit corporations by former Section 2222 through former Section 9002.

Subdivision (b) is new.

Note. The term "business corporation" should be broadly defined for purposes of this section.

Tentatively Approved March 1976
Staff Revision June 1976

§ 5726. Voting of membership standing in name of two or more persons
or group

5726. (a) Unless the bylaws provide otherwise, this section applies if:

(1) A membership stands in the names of two or more persons, whether fiduciaries, members of a partnership, joint tenants, tenants in common, husband and wife as community property, or tenants by the entirety.

(2) A membership stands in the name of a partnership, association, family, or other group.

(3) Two or more persons (including proxyholders) have the same fiduciary relationship respecting the same membership, unless the secretary of the nonprofit corporation is given written notice to the contrary and is furnished with a copy of the instrument or order appointing them or creating the relationship wherein it is so provided.

(b) A membership described in subdivision (a) shall be voted by the persons or members of the group in whose name the membership stands or by the persons who have the same fiduciary relationship respecting the membership, with the following effect:

(1) If only one person votes, the act binds all.

(2) If more than one person votes, the act of the majority binds all. If the vote is evenly split on a matter, each faction may vote the membership proportionately. If the membership record or instrument or order shows that the membership is held in unequal interests, a majority or even split for the purposes of this paragraph is a majority or even

split in interest.

Comment. Section 5726 is the same in substance as Section 704 (General Corporation Law), with the inclusion of families, partnerships, associations, and other groups. It continues provisions of former Section 2223 applicable to nonprofit corporations through former Section 9002. It should be noted, however, that no member may hold a fractional membership or a joint interest in a membership unless the bylaws so provide. Section 5400. Moreover, where a nonprofit corporation allows memberships in the names of two or more persons, Section 5726 permits the bylaws to provide differing voting requirements, such as designation of a single voting representative or fractional voting.

968/601

§ 5730

Staff Draft June 1976

Article 3. Proxies

§ 5730. When proxy voting allowed

5730. Unless the bylaws provide otherwise, a person entitled to vote a membership may authorize another person to vote the membership by proxy.

Comment. Section 5730 is the same in substance as the first sentence of Section 705(a) (General Corporation Law) except that the bylaws may preclude voting by proxy. This continues a portion of former Section 9601. See also Section 5263 (bylaws relating to voting rights).

968/602

§ 5731

Staff Draft June 1976

§ 5731. Execution of proxy

5731. (a) A proxy shall be signed by the person entitled to vote the membership or the person's attorney in fact placing the person's name on the proxy, whether by manual signature, typewriting, telegraphic transmission, or otherwise.

(b) A proxy purporting to be executed in a manner provided in this section is presumptively valid.

Comment. Section 5731 is new to nonprofit corporation law.

Subdivision (a) is comparable to the second sentence of Section 178 (General Corporation Law).

Subdivision (b) is the same in substance as the second sentence of Section 705(a)(General Corporation Law).

968/603

§ 5732

Staff Draft June 1976

§ 5732. Form of proxy

5732. (a) A proxy shall afford an opportunity on the form to specify a choice among approval, disapproval, or abstention with respect to each proposal set forth therein, or in connection with which the proxy is solicited, other than election of directors. The proxy shall be voted in accordance with the choice specified, if any.

(b) In an election of directors, a proxy in which the nominees for election are set forth and which is marked "withhold" or otherwise marked in a manner indicating that the authority to vote for directors is withheld, shall not be voted either for or against the election of a director.

(c) Failure to comply with this section does not invalidate any corporate action taken but may be the basis for challenging a proxy. The superior court may compel compliance with this section on action by a member.

(d) Nothing in this section precludes use of a general proxy in which specific proposals or nominees for directors are not set forth.

Comment. Section 5732 is comparable to a portion of Section 604 (General Corporation Law). It is new to nonprofit corporation law.

Subdivision (d) is drawn from Cal. Stats. 1975, Ch. 562. For a comparable provision relating to written consents, see Section 5634 (form of written consent).

968/604

§ 5733

Staff Draft June 1976

§ 5733. Duration of proxy

5733. (a) Unless otherwise specified in the proxy, a proxy is not valid after the expiration of 11 months from the date of its execution.

(b) A proxy may specify its duration, but a proxy is not valid after the expiration of three years from the date of its execution unless the proxy is coupled with an interest.

Comment. Section 5733 supersedes a portion of former Section 2226, which was applicable to nonprofit corporations through former Section 9002. Cf. Braude v. Havenner, 38 Cal. App.3d 526, 113 Cal. Rptr. 386 (1974). Section 5733 reduces the maximum duration of a proxy from seven to three years. Compare Section 705(b) (General Corporation Law), which imposes no maximum duration.

Staff Draft June 1976

§ 5734. Revocation of proxy

5734. (a) Except as otherwise provided in this article, a proxy continues in full force and effect until revoked prior to the vote pursuant thereto.

(b) A proxy may be revoked by any of the following means:

(1) A writing by the person executing the proxy delivered to the nonprofit corporation stating that the proxy is revoked.

(2) Execution of a subsequent proxy by the person executing the proxy. The dates contained on the forms of proxy presumptively determine the order of execution, regardless of the postmark dates on the envelopes in which they are mailed.

(3) Voting in person by the person executing the proxy.

(4) Receipt by the nonprofit corporation, before the vote is counted, of written notice of the death or incapacity of the person executing the proxy.

Comment. Section 5734 is comparable to the last portion of Section 705(a) (General Corporation Law). It supersedes former Sections 2226-2228, which were applicable to nonprofit corporations through former Section 9002. Cf. Braude v. Havenner, 38 Cal. App.3d 526, 113 Cal. Rptr. 386 (1974). Section 5734 is subject to Sections 5733 (duration of proxy) and 5735 (irrevocable proxies).

Staff Draft June 1976

§ 5735. Irrevocable proxies

5735. (a) A proxy which states that it is irrevocable is irrevocable for the period specified in the proxy when it is coupled with an interest.

(b) A proxy described in subdivision (a) may be revoked by a purchaser of the membership without knowledge thereof unless the existence of the proxy and its irrevocability appear on the membership certificate, if any.

(c) A proxy described in subdivision (a) becomes revocable when the interest with which it is coupled is discharged, terminated, or otherwise satisfied.

Comment. Section 5735 is comparable to Section 705(e) (General Corporation Law).

Staff Draft June 1976

§ 5736. When proxy required

5736. Except when other provision has been made by written agreement between the parties, where a membership is held of record by a person other than the member, whether as a pledgee, security holder, or otherwise, the holder of the membership shall issue to the member, upon demand therefor and payment of necessary expenses thereof, a proxy to vote or take other action thereon.

Comment. Section 5736 is comparable to Section 705 (General Corporation Law).

Article 4. Voting Agreements

Comment. Article 4 (commencing with Section 5740) is comparable to Section 706 (General Corporation Law). It supersedes the voting trust provisions of former Sections 2230 and 2231, which were applicable to nonprofit corporations through former Section 9002.

Tentatively Approved March 1976
Renumbered June 1976

§ 5740. Voting agreements authorized

5740. (a) Two or more persons entitled to vote memberships may agree that the memberships will be voted as provided in the agreement or as determined by a procedure provided in the agreement or agreed upon by the parties.

(b) The agreement shall be in writing and signed by the parties thereto.

Comment. Section 5740 is the same in substance as a portion of the first sentence of Section 706(a) (General Corporation Law) except that it is not limited to close corporations.

Tentatively Approved March 1976
Renumbered June 1976

§ 5741. Duration of voting agreements

5741. (a) An agreement under this article may be made for a period not exceeding 10 years.

(b) The fact that by its terms an agreement under this article will or may last beyond a 10-year period does not affect the validity of the agreement during a period of 10 years from the date it was made.

Comment. Section 5741 is comparable to the first portion of Section 706(b) (General Corporation Law), which relates to voting trusts.

Tentatively Approved March 1976
Renumbered June 1976

§ 5742. Extension of duration of voting agreements

5742. (a) The parties to an agreement under this article may by written agreement extend the duration of the agreement for an additional period not exceeding 10 years from the expiration date of the agreement as originally made or as last extended as provided in this section.

(b) An extension of an agreement may be made under this section at any time within two years prior to the expiration of the agreement as originally made or as last extended as provided in this section.

Comment. Section 5742 is comparable to the middle portion of Section 706(b) (General Corporation Law), which relates to voting trusts.

4628

§ 5743

Tentatively Approved March 1976
Renumbered June 1976

§ 5743. Transfer of membership pursuant to voting agreement

5743. If the bylaws permit transfer of memberships, the parties to an agreement under this article may transfer the memberships covered by the agreement to a third party with authority to vote the memberships in accordance with the terms of the agreement.

Comment. Section 5743 is the same in substance as a portion of the first sentence of Section 706(a) (General Corporation Law).

4629

§ 5744

Tentatively Approved March 1976
Renumbered June 1976

§ 5744. Enforcement of voting agreements

5744. An agreement under this article shall not be denied specific performance by a court on the ground that the remedy at law is adequate or on other grounds relating to the jurisdiction of a court of equity.

Comment. Section 5744 is the same in substance as the second sentence of Section 706(a) (General Corporation Law).

Article 5. Inspectors of Election

Comment. Article 5 (commencing with Section 5750) is comparable to Section 707 (General Corporation Law). It continues provisions of former Sections 2232 and 2233 applicable to nonprofit corporations through former Section 9002.

Tentatively Approved March 1976
Renumbered June 1976

§ 5750. Appointment of inspector

5750. (a) In advance of a meeting of members, the board may appoint an inspector of election to act at the meeting and any adjournment thereof.

(b) If an inspector of election is not appointed pursuant to subdivision (a), or if a person appointed as inspector of election fails to appear or refuses to act, the chairman of a meeting of members may, and on the request of a person entitled to vote at the meeting shall, appoint an inspector of election at the meeting.

4632

§ 5751

Tentatively Approved March 1976
Renumbered June 1976

§ 5751. Number of inspectors

5751. (a) The number of inspectors of election shall be either one or three.

(b) If appointed at a meeting on request of a person entitled to vote at the meeting, the majority of the votes represented at the meeting shall determine whether the number of inspectors of election is one or three.

4633

§ 5752

Tentatively Approved March 1976
Renumbered June 1976

§ 5752. Authority of inspector

5752. The inspector of election shall:

- (a) Determine the memberships represented at the meeting.
- (b) Determine the number of votes to which each membership is entitled and the number of votes entitled to be cast.
- (c) Determine the existence of a quorum.
- (d) Determine the authenticity, validity, and effect of proxies.
- (e) Receive votes, ballots, or consents.
- (f) Hear and determine all challenges and questions in any way arising in connection with the right to vote.
- (g) Count and tabulate all votes or consents.

(h) Determine when the polls shall close.

(i) Determine the result.

(j) Do such other acts as may be proper to conduct the election or vote with fairness to all members.

4634

§ 5753

Tentatively Approved March 1976
Renumbered June 1976

§ 5753. Duty of care of inspector

5753. The inspector of election shall perform the duties of an inspector impartially, in good faith, to the best of his or her ability, and as expeditiously as is practical.

4635

§ 5754

Tentatively Approved March 1976
Renumbered June 1976

§ 5754. Evidentiary effect of act of inspector

5754. (a) A report or certificate made by the inspector of election is prima facie evidence of the facts stated therein.

(b) If there are three inspectors of election, the decision, act, or certificate of a majority is effective in all respects as the decision, act, or certificate of all.

Article 6. Contested Elections

Comment. Article 6 (commencing with Section 5760) is comparable to Section 709 (General Corporation Law). It continues provisions of former Sections 2236-2238 applicable to nonprofit corporations through former Section 9002. See braude v. Havenner, 38 Cal. App.3d 526, 113 Cal. Rptr. 386 (1974).

This article provides an equitable remedy in which the scope of inquiry is not limited to technical and procedural questions. 38 Cal. App.3d at 530, 113 Cal. Rptr. at _____. A court that has entered judgment pursuant to this article may reserve continuing jurisdiction to oversee the implementing election procedures. Cf. 1 B. Witkin, California Procedure § 286 (2d ed. 1970).

404/296

§ 5760

Tentatively Approved March 1976.
Renumbered June 1976

§ 5760. Action to determine validity of election or appointment

5760. The validity of an election or the appointment of a director of a nonprofit corporation, or of a foreign nonprofit corporation if the election was held or the appointment was made in this state, may be tried and determined in the manner provided in this article.

Tentatively Approved March 1976
Renumbered June 1976

§ 5761. Persons authorized to bring action

5761. An action under this article may be brought by either of the following persons:

(a) A person entitled to vote on the election or appointment.

(b) A person who claims to have been denied the right to vote.

Tentatively Approved March 1976
Renumbered June 1976

§ 5762. Jurisdiction and venue

5762. (a) Except as provided in subdivision (b), an action under this article shall be brought in the superior court of the proper county.

(b) In the case of a foreign nonprofit corporation, an action under this article may be brought at the option of the plaintiff in the superior court of the county (1) in which the foreign nonprofit corporation has its principal office in this state or (2) in which the election was held or the appointment was made.

404/982

§ 5763

Tentatively Approved March 1976
Renumbered June 1976

§ 5763. Court order fixing date for hearing

5763. (a) When an action under this article is brought, before any further proceedings, the court shall enter an order that fixes a date for the hearing.

(b) The date fixed for the hearing shall be within five days unless for good cause shown the court fixes a later date.

404/983

§ 5764

Tentatively Approved March 1976
Renumbered June 1976

§ 5764. Notice of hearing

5764. (a) The plaintiff shall serve notice of the date for the hearing and a copy of the complaint upon all of the following:

- (1) The nonprofit corporation.
- (2) The person whose purported election or appointment is questioned.
- (3) Any person (other than the plaintiff) whom the plaintiff alleges to have been elected or appointed.

(b) Service shall be in the manner in which a summons is required to be served or, if the court so directs, by registered mail.

(c) The court may make such further requirements as to notice as appear to be proper under the circumstances.

Tentatively Approved March 1976
and Renumbered June 1976

§ 5765. Authority of court

- 5765. The court may:**
- (a) Determine the person entitled to the office of director.
 - (b) Order a new election to be held or appointment to be made.
 - (c) Determine the validity, effectiveness, and construction of voting agreements.
 - (d) Determine the validity of the issuance of memberships and the right of persons to vote.
 - (e) Direct such other relief as may be just and proper.

Tentatively Approved
March 1976

CHAPTER 8. MEMBERS' DERIVATIVE ACTIONS

Article 1. Right to Bring Derivative Action

§ 5810. Right of member to bring derivative action

5810. A member of a domestic or foreign nonprofit corporation may institute and maintain an action in the right of the nonprofit corporation only as provided in this chapter.

Comment. Section 5810 makes explicit the right of a member of a nonprofit corporation to bring a derivative suit. Before the enactment of this chapter, Section 834 of the former General Corporation Law (predecessor of Section 800 of the new General Corporation Law) governed such actions in the right of nonprofit corporations. See former Sections 103 ("shareholder" includes "member") and 9002 (incorporating provisions of General Corporation Law). See also Ashton v. Dashaway Ass'n, 81 Cal. 51, 22 P. 660 (1890). References in Section 800 to voting trusts and voting trust certificates have not been continued in this chapter because the General Nonprofit Corporation Law does not provide for voting trusts.

Note. The staff will give further consideration to the inclusion of foreign nonprofit corporations in this section when we consider the general subject of foreign nonprofit corporations.

Substance Tentatively
Approved March 1976

§ 5811. Action by member; contemporaneous membership rule

5811. An action may be brought pursuant to this chapter only by a plaintiff who satisfies both of the following requirements:

(a) The plaintiff is a member of the nonprofit corporation at the time the action is commenced.

(b) Except as otherwise provided in Section 5812, the plaintiff was a member of the nonprofit corporation at the time of the transaction (or any part thereof) complained of or holds a membership which devolved upon the plaintiff by operation of law from a person who was a member at such time.

Comment. Section 5811 is based on a portion of subdivision (b)(1) of Section 806 of the General Corporation Law and subdivision (a)(1) of former Section 834. Section 5811, however, states its rules in substantive rather than procedural form.

Substance Tentatively
Approved March 1976

§ 5812. Exception to contemporaneous membership rule; notice and hearing

5812. (a) A plaintiff who does not satisfy the requirement of subdivision (b) of Section 5811 may be permitted to maintain an action under this chapter if the plaintiff shows and the court determines that all of the following conditions exist:

(1) There is a strong prima facie case in favor of the claim asserted on behalf of the nonprofit corporation.

(2) No other similar action has been or is likely to be instituted.

(3) The plaintiff became a member before there was disclosure to the public or to the plaintiff of the alleged wrongdoing.

(4) Unless the action can be maintained, the defendant may retain a gain derived from the defendant's alleged willful breach of a fiduciary duty.

(5) The requested relief will not result in unjust enrichment of the nonprofit corporation or any member of the nonprofit corporation.

(b) The court's determinations shall be made at a preliminary hearing held on noticed motion.

Comment. Section 5812 provides an exception to the contemporaneous membership rule provided in subdivision (b) of Section 5811. Section 5812 is substantively the same as a portion of subdivision (b)(1) of Section 800 of the General Corporation Law. The procedure normally applicable to noticed motions applies to motions under this section; hence, the provision in subdivision (b)(1) of Section 800 concerning the nature of the evidence at the hearing has not been continued.

Substance Tentatively
Approved March 1976

Article 2. Remedies to Dissolving Action

§ 5820. Effort to remove action from board jurisdiction

5820. (a) Before bringing an action pursuant to this chapter, the plaintiff shall make an effort to remove from the board the action the plaintiff desires unless the effort would be futile.

(b) Such efforts or the reasons for not making them shall be alleged with the particularity in the complaint.

Comment. Section 5820 is based on a portion of subdivision (b) (2) of Section 500 of the General Corporation Law and subdivision (a) (2) of former Section 514. Like Section 500, subdivision (a) of Section 5820 is stated as a substantive rather than a procedural rule. Subdivision (b) reinforces the requirement of subdivision (b) (2) of Section 500 that the attempt to remove the lawsuit from the board be stated with particularity in the complaint.

Substance Tentatively
Approved March 1976

§ 5821. Notice to nonprofit corporation of cause of action

5821. Before bringing an action pursuant to this chapter, the plaintiff shall do either of the following:

(a) Inform the nonprofit corporation or the board in writing of the ultimate facts of each cause of action against each defendant.

(b) Deliver to the nonprofit corporation or the board a true copy of the complaint that the plaintiff proposes to file.

Comment. Section 5821 is based on a portion of subdivision (b)(2) of Section 800 of the General Corporation Law and subdivision (a)(2) of former Section 834. Like subdivision (a) of Section 5811, Section 5821 is stated in substantive rather than procedural form.

Substance Tentatively
Approved March 1976

Article 3. Security for Defendant's Expenses; Exception

§ 5830. Motion for security for defendant's expenses; extension of time

5830. (a) Except as otherwise provided in Section 5839, in an action pursuant to this chapter, at any time within 30 days after service of summons upon the nonprofit corporation or upon a defendant who is an officer or director of the nonprofit corporation or held such office at the time of the transaction complained of, the nonprofit corporation or such other defendant may move the court for an order requiring the plaintiff to furnish security for the reasonable expenses, including attorney's fees [and expenses for which the nonprofit corporation may become liable pursuant to Section _____], that may be incurred by the moving party in connection with the action as provided in this article.

(b) On application of the nonprofit corporation or such other defendant, the court may, for good cause shown, extend the 30-day period provided by subdivision (a) for an additional period or periods not exceeding 60 days.

Comment. Subdivision (a) of Section 5830 is the same in substance as a portion of subdivision (c) of Section 800 of the General Corporation Law. Section 5839, which is noted in the introductory phrase of subdivision (a), makes the motion procedure inapplicable where the action is brought by 50 members or at least 10 percent of the members, whichever number is smaller.

Subdivision (b) is the same in substance as the last sentence of subdivision (c) of Section 800 of the General Corporation Law and the last sentence of subdivision (b) of former Section 834.

See Section 5838 (bond to avoid motion proceedings).

Note. The blank section reference in subdivision (a) is intended to hold a place until the provisions concerning indemnification of officers and directors are considered.

404/960

§ 5831

Substance Tentatively
Approved March 1976

§ 5831. Grounds of motion for security

5831. (a) A motion by the nonprofit corporation shall be made upon the grounds that there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against the nonprofit corporation will benefit the nonprofit corporation or its members.

(b) A motion by a defendant who is an officer or director or held such office at the time of the transaction complained of shall be made upon either or both of the following grounds:

(1) That there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against such defendant will benefit the nonprofit corporation or its members.

(2) That such defendant did not participate in the transaction complained of in any capacity.

Comment. Section 5831 is the same in substance as a portion of subdivision (c) of Section 800 of the General Corporation Law and a portion of subdivision (b) of former Section 834. Section 5831 makes more specific the nature of the showing required to be made by each type of defendant in order to prevail on the motion for security under this article.

Substance Tentatively
Approved March 1976

§ 5832. Hearing and determination of motion; amount of security

5832. (a) If the court, after the hearing on the motion, determines that the grounds for the motion have been established, the court shall order the plaintiff to furnish security.

(b) The security shall be in an amount equal to the probable reasonable expenses, including attorney's fees (and, in the case of the nonprofit corporation, expenses for which the nonprofit corporation may become liable pursuant to Section ____), that the prevailing moving party has shown it will have incurred by the conclusion of the action.

(c) The amount of the security shall not exceed fifty thousand dollars (\$50,000) in the aggregate for all defendants.

Comment. Section 5832 is based on portions of subdivision (d) of Section 800 of the General Corporation Law. The grounds of the motion are stated in Section 5831. Subdivision (a) of Section 5832 differs from subdivision (d) of Section 800 in that it does not contain specific provisions for taking evidence since it is contemplated that general law regarding noticed motions applies. Hence, at the hearing, the usual showing is by affidavits or declarations although the court may receive oral and documentary evidence as well. 4 B. Witkin, California Procedure, Proceedings Without Trial, §§ 24-25, at 2693-2694 (2d ed. 1971).

Subdivision (b) makes clear that, in order to have recourse to the security, the nonprofit corporation must be a prevailing moving party. See Section 5836; compare Section 800. [Section ____, referred to in this subdivision, provides for indemnification of officers, directors, and agents of the nonprofit corporation.]

Subdivision (c) provides a maximum amount of security that may be required of the plaintiff and is the same as the limit provided by subdivision (d) of Section 800.

101/161

§ 5833

Substance Tentatively
Approved March 1976

§ 5833. Increase or decrease of security; noticed motion; maximum amount

5833. (a) The amount of the security initially determined may be increased or decreased by the court, after further hearing upon noticed motion, if the court determines that the security has or may become inadequate or excessive.

(b) The court may not in any event increase the total amount of the security beyond fifty thousand dollars (\$50,000) in the aggregate for all defendants.

Comment. Section 5833 is the same in substance as a portion of subdivision (d) of Section 800 of the General Corporation Law. See Comment to Section 5832.

405/436

§ 5834

Staff Draft

§ 5834. Time for furnishing security; effect of failure to furnish

5834. (a) The plaintiff required to furnish security or increase the amount of the security shall do so not later than 20 days after service of the court's order or within such other reasonable time as the court may order.

(b) If the plaintiff does not comply with subdivision (a), the action shall be dismissed as to the defendant in whose favor the order requiring the security was made.

Comment. Section 5834 is based on a portion of subdivision (d) of Section 800 of the General Corporation Law but makes a clarifying change and an addition. Subdivision (a) provides that the plaintiff has 20 days within which to furnish security where the court does not specify some other reasonable time. Section 800 provides only for a reasonable time to be set by the court. Subdivision (a) also makes clear that the time limit for furnishing the security applies where an order increasing the amount of the security is made pursuant to Section 5833. If the court authorizes the undertaking to be decreased under Section 5833, compliance by the plaintiff is optional.

Subdivision (b) is the same in substance as a portion of subdivision (d) of Section 800.

405/434

§ 5835

Staff Draft

§ 5835. Stay of proceedings

5835. If a motion is filed pursuant to this article, no pleadings need be filed by the nonprofit corporation or any other defendant and the prosecution of the action is thereby stayed until 10 days after the motion is denied or, if granted, until 10 days after the required security has been furnished and the defendant has been given written notice thereof.

Comment. Section 5835 continues the provisions of subdivision (f) of Section 800 of the General Corporation Law for an automatic stay for 10 days and for postponement of the filing of pleadings by the defendants but varies in several respects. Section 5835 provides that, where the motion for security is granted, the 10-day stay period runs from the

time when security is furnished and the defendant has received notice thereof. Where the motion is granted but the plaintiff fails to furnish security within the allotted time, the action is dismissed. See Section 5834.

405/435

§ 5836

Tentatively Approved
March 1976

§ 5836. Recourse to security

5836. The prevailing moving party shall have recourse to the security upon the termination of the action in an amount determined by the court at a hearing upon noticed motion.

Comment. Section 5836 is based on a portion of subdivision (d) of Section 800 of the General Corporation Law. Section 5836, however, makes clear that only parties who prevailed on the motion may have recourse to the security and that the court makes its determination on noticed motion.

405/437

§ 5837

Tentatively Approved
March 1976

§ 5837. Effect of court's determinations

5837. The determinations of the court under this article have no effect on the determination of any issues on the merits of the action.

Comment. Section 5837 is the same in substance as a portion of subdivision (d) of Section 800 of the General Corporation Law.

Staff Draft

§ 5838. Bond to avoid motion proceedings

5838. If at any time the plaintiff posts a good and sufficient bond in the aggregate amount of fifty thousand dollars (\$50,000) to secure the reasonable expenses, including attorney's fees, of the parties entitled to make a motion pursuant to this article, the plaintiff shall be deemed to have complied with this article and with any order for security made hereunder. Any pending motion for security shall be dismissed and no further or additional bond or other security may be required.

Comment. Section 5838 is the same in substance as subdivision (c) of Section 500 of the General Corporation Law.

Staff Draft

§ 5839. Exemption to security for defendant's expenses

5839. If an action is brought pursuant to this chapter by at least 30 members or at least 10 percent of the members, whichever number is smaller, the plaintiffs shall not be required to furnish security for the defendant's expenses.

Comment. Section 5839 permits plaintiffs who meet the stated numerical requirements to avoid having to furnish security for the defendant's expenses under this article. This section has no predecessor in California law but is similar to Section 7765 of the Pennsylvania Corpo-

ration Not-for-profit Code. Of course, all such plaintiffs must satisfy the requirements of Article 1 (commencing with Section 5810) and Article 2 (commencing with Section 5820) of this chapter.

Note. This section was considered at the March 1976 meeting, but no decision was reached.

Tentatively Approved
March 1976

Article 4. Discontinuation of Derivative Action

§ 5840. Discontinuation of action; court approval

5840. An action brought pursuant to this chapter shall not be dismissed, discontinued, compromised, or settled without the approval of the court.

Comment. Section 5840 codifies the rule stated in Bocher v. Bocher, Alexander & Barson, Inc., 187 Cal. App.2d 407, 9 Cal. Rptr. 732 (1960).

Tentatively Approved
March 1976

CHAPTER 9. AMENDMENT OF ARTICLES

Article 1. Purposes of Amendments

§ 5910. Permissible amendments of articles

5910. (a) By complying with the provisions of this chapter, a non-profit corporation may amend its articles from time to time, in any and as many respects as may be desired, so long as its articles as amended contain only such provisions as it would be lawful to insert in original articles filed at the time of the filing of the amendment.

(b) It is the intent of the Legislature in adopting this section to exercise to the fullest extent the reserve power of the state over non-profit corporations and to authorize any amendment of the articles covered by subdivision (a) regardless of whether any provision contained in the amendment was permissible at the time of the organization of the nonprofit corporation.

Comment. Section 5910 is the same in substance as Section 900(a) (General Corporation Law). It supersedes former Sections 3600-3602, which were applicable to nonprofit corporations through former Section 9305.

368/218

§ 5911

Tentatively Approved
March 1976

Staff Revision May 1976

§ 5911. Amendment to delete initial director

5911. Notwithstanding Section 5910, a nonprofit corporation shall not amend its articles to alter the statement in the original articles of the name and address of an initial director except to correct an error in the statement or to delete the statement after the nonprofit corporation has filed a statement under Section 6531.

Comment. Section 5911 is comparable to Section 900(b) (General Corporation Law). It supersedes former Section 3603, which was applicable to nonprofit corporations through former Section 9305. A correction of an error in the articles may be made by a certificate of correction. See Article 3 (commencing with Section 14835) of Chapter 3 of Division 4.

Note. The staff revision deletes references to the initial agent, which is not required to be stated in the articles. The Commission has also tentatively determined not to include a statement of directors in the Section 6531 statement; Section 5911 may require revision or deletion accordingly.

368/219

§ 5912

Tentatively Approved
March 1976

§ 5912. Extension of corporate existence

5912. (a) A nonprofit corporation formed for a limited period may at any time subsequent to the expiration of the term of its corporate

existence, if it has continuously acted as a nonprofit corporation and conducted activity as such, extend the term of its existence by an amendment to its articles removing any provision limiting the term of its existence and providing for perpetual existence.

(b) The certificate of amendment shall set forth that the nonprofit corporation continuously acted as a nonprofit corporation and conducted activities as such from the expiration of its term of corporate existence to the date of the amendment.

(c) For the purpose of the adoption of an amendment described in subdivision (a), persons who have been functioning as directors of the nonprofit corporation shall be considered to have been validly elected even though their election may have occurred after the expiration of the original term of the corporate existence.

(d) If the filing of the certificate of amendment providing for perpetual existence would be prohibited by the provisions of Section 14821 if it were original articles, the Secretary of State shall not file the certificate unless by the same or a concurrently filed certificate of amendment the articles of the nonprofit corporation are amended to adopt a new available name.

Comment. Section 5912 is the same in substance as Section 909 (General Corporation Law). It supersedes former Sections 3700-3703, which were applicable to nonprofit corporations through former Section 9305.

Unlike the former provisions, Section 5912 applies only to extensions of corporate existence made after expiration of the nonprofit corporation's term of existence; extensions prior to expiration are made pursuant to the general amendment provisions of this chapter. The vote required to amend the articles to extend corporate existence is the vote required for other amendments to the articles. Contrast former Section 3701.

Not Approved; See Minutes
March 1976

§ 5913. Amendment of articles of charitable corporation

5913. If a nonprofit corporation holds assets on a charitable trust or is organized for charitable purposes, the nonprofit corporation shall give written notice to the Attorney General of any proposed amendment of the articles to alter any of the following provisions:

(a) The name of the nonprofit corporation.

(b) The purposes for which the nonprofit corporation is organized.

(c) The law under which the nonprofit corporation is organized.

Comment. Section 5913 is new. Compare former Section 3602(b) (limitation on amendment of articles to exist under a law other than the law under which a corporation was organized or exists). It is designed to assist the Attorney General in enforcement of its supervisory duties over charitable trusts.

Note. Further information concerning the meaning of subdivision (c) is necessary.

Tentatively Approved
March 1976

Article 2. Adoption and Approval of Amendments

§ 5920. Vote required in articles

5920. Notwithstanding any other provision of this article, where the articles set forth a provision requiring the vote of a larger proportion or all of the members or any class of members, or a larger proportion or all of the directors, than is otherwise required by this article for approval of any amendment of the articles or an amendment of a particular kind or for a particular purpose, the amendment shall be adopted only with the approval so required.

Comment. Section 5920 supersedes the last paragraph of former Section 3632, which was applicable to nonprofit corporations through former Sections 9303 and 9305.

Note. AB 2849 (clean-up bill) would add a new provision to require that any provision of the articles imposing a larger than ordinary vote requirement for corporate action may be amended only by the same larger than ordinary vote. We will follow the progress of the proposed amendment.

Not Approved; See Minutes
March 1976

§ 5921. Adoption of amendments before members admitted

5921. Before any members have been admitted or where the nonprofit corporation has, in fact, no members other than the persons constituting

the board, an amendment of the articles may be adopted by a writing signed by a majority of the directors.

Comment. Section 5921 supersedes provisions applicable to non-profit corporations by former Section 3630 through former Section 9305. For a comparable provision, see Section 901 (General Corporation Law).

Unlike the former provision, Section 5921 permits adoption of amendments by directors rather than incorporators and permits adoption by majority rather than two-thirds vote.

Note. The need for this section should be reviewed in light of the general provisions relating to directors exercising the rights of members where there are no other members.

368/240

§ 5922

Not Approved; See Minutes
March 1976

§ 5922. Adoption of amendments by board and members

5922. (a) An amendment of the articles may be adopted if approved by the board and by the members entitled to vote thereon. Approval of the members may be either before or after the approval of the board.

(b) Approval of the members shall be by a majority of the votes cast but in no case by a vote of less than two-thirds of a quorum required for a meeting of members.

Comment. Section 5922 continues and clarifies the portion of the first paragraph of former Section 3632 that related to nonprofit corporations. For a comparable provision, see Section 902(a) (General Corporation Law). The phrase "approved by (or approval of) the board" is defined in Section 5151. For a quorum of a meeting of members, see Section 5614.

Tentatively Approved
March 1976

Staff Revision May 1976

§ 5923. Adoption of amendments by board alone

5923. Notwithstanding Section 5922, an amendment deleting the name and address of an initial director may be adopted with approval of the board alone.

Comment. Section 5923 is the same in substance as Section 902(c) (General Corporation Law). An amendment described in this section may not be made unless the nonprofit corporation has filed a statement under Section 6502. See Section 5911. The phrase "approval of the board" is defined in Section 5151.

Note. Subdivision (b) of Section 902 (General Corporation Law) permits amendment by approval of the board alone in cases of corporations organized prior to August 14, 1929; the staff has not been able to discern the reason for this provision but plans to communicate with the State Bar Committee concerning it.

The staff revision deletes references to the initial agent, which is not required to be stated in the articles.

Tentatively Approved
March 1976

§ 5924. Adoption of amendments by policymaking committee

5924. (a) If the bylaws of a nonprofit corporation so provide and if consistent with the articles, any member action required for the adoption of an amendment to the articles may be taken by the vote of at least two-thirds of the members of a policymaking committee.

(b) The policymaking committee shall be created by the members of the nonprofit corporation to represent and act for the members in this matter, with or without authority to represent and act for the members in other matters. Only members of the nonprofit corporation who are representative of the membership shall serve on the committee.

Comment. Section 5924 continues former Section 3632.5, adding the requirement that the committee members be representative.

Note. Whether the term "vote" is used properly here as a defined term is to be investigated.

368/244

§ 5925

Tentatively Approved
March 1976

§ 5925. When class vote required

5925. (a) Notwithstanding any other provision of this division, a proposed amendment of the articles or bylaws must be approved by vote of not less than a majority of the votes cast by members of a class, whether or not the class is entitled to vote thereon by provisions of the articles or bylaws, if the amendment would adversely affect the property, voting, or other rights or interests of the members of the class to a greater extent than members of other classes.

(b) In addition to approval by a class as provided in subdivision (a), a proposed amendment of the articles or bylaws must also be approved as required by statute.

Comment. Section 5925 is new; for a comparable provision, see Section 903 (General Corporation Law).

Subdivision (a) requires a class vote in cases where an amendment of the articles or bylaws would adversely affect members of a particular class to a greater extent than members of other classes. Such an amendment might have an adverse effect either directly through restrictions on class rights and privileges or indirectly through increase of rights and privileges of other members or creation of new memberships that will have the effect of diluting the rights of the class members.

Subdivision (b) makes clear that class approval of adverse amendments is not alone sufficient for adoption of the amendments. The amendments must meet the other statutory requirements for approval. See, e.g., Sections 5260 (adoption of bylaw amendments) and 5922 (adoption of articles amendments).

Note. This section should be placed in the chapter relating to voting rights.

Tentatively Approved
March 1976

Article 3. Certificates of Amendment

§ 5930. Certificate of amendment

5930. Upon adoption of an amendment of the articles, the nonprofit corporation shall file a certificate of amendment.

Comment. Section 5930 supersedes former Section 3670, which was applicable to nonprofit corporations through former Section 9305.

Note. The staff has not yet collected cases for inclusion in the Comment relating to the effect of delay or failure to file certificates of amendment.

Tentatively Approved
March 1976

§ 5931. Contents of certificate of amendment

5931. The certificate of amendment shall be an officers' certificate, which states the following:

(a) The wording of the amendment or amended articles in accordance with Section 5932.

(b) That the amendment was approved by the required number of directors in accordance with Article 2 (commencing with Section 5920). If the amendment is one which may be adopted by the board alone, a statement of the facts entitling the board alone to adopt the amendment.

(c) If the amendment is one for which the approval of the members is required, the applicable one of the following:

(1) That the amendment was approved by the required number of members in accordance with Article 2 (commencing with Section 5920).

(2) That the amendment was approved by the required number of members of a representative policymaking committee in accordance with Section 5925.

(3) If the amendment was one for which the approval of a class of members was also required, in addition to the information in paragraph (1) or (2), that the number of members of the class voting in favor of the amendment equaled or exceeded the vote required.

Comment. Section 5931 is comparable to Sections 905 and 906 (General Corporation Law). It supersedes former Sections 3671 and 3672, which were applicable to nonprofit corporations through former Section 9305. Section 5931 omits some of the requirements of the former sections for the contents of the certificate of amendment, including a statement of the time and place of the meeting at which the resolution adopting the amendment was approved and the number of members voting in favor of the resolution. The phrase "officers' certificate" is defined in Section 5173.

Note. Section 905 of the business corporations law provides an exception for amendments of the articles pursuant to a merger; we will deal with this when we consider mergers.

368/247

§ 5932

Tentatively Approved
March 1976

§ 5932. Certificate of amendment to establish wording of amendment

5932. The certificate of amendment shall establish the wording of the amendment or amended articles by one or more of the following means:

(a) By stating that the articles shall be amended to read as therein set forth in full.

(b) By stating that any provision of the articles, which shall be identified by the numerical or other designation given it in the articles or by stating the wording thereof, shall be stricken from the articles or shall be amended to read as set forth in the certificate.

(c) By stating that the provision set forth therein shall be added to the articles.

Comment. Section 5932 is the same in substance as a portion of Section 907 (General Corporation Law). It supersedes former Section 3631, which was applicable to nonprofit corporations through former Section 9305.

368/248

§ 5933

Tentatively Approved
March 1976

§ 5933. Effect of filing certificate of amendment

5933. (a) Upon filing the certificate of amendment, the articles are amended in accordance with the certificate.

(b) A copy of the certificate of amendment, certified by the Secretary of State, is prima facie evidence of the performance of the conditions necessary to the adoption of the amendment.

Comment. Section 5933 is the same in substance as Section 908 (General Corporation Law). It continues former Section 3673, which was applicable to nonprofit corporations through former Section 9305.

Tentatively Approved
March 1976

Article 4. Restatement of Articles

§ 5940. Restated articles

5940. A nonprofit corporation may restate in a single certificate the entire text of its articles as amended by filing an officers' certificate entitled "Restated Articles of Incorporation of _____ (insert name of nonprofit corporation)."

Comment. Section 5940 is the same in substance as Section 910(a) (General Corporation Law). It continues a portion of the first paragraph of former Section 3800, which was applicable to nonprofit corporations through former Section 9305.

Tentatively Approved
March 1976

Staff Revision May 1976

§ 5941. Contents of restated articles

5941. The certificate of restated articles shall set forth the articles as amended to the date of the certificate except that:

(a) The certificate shall omit the signatures of the initial directors and, after the nonprofit corporation has filed a statement under Section 6531, the names and addresses of the initial directors. Such omissions are not alterations or amendments of the articles.

(b) The certificate may also itself alter or amend the articles in any respect, in which case the certificate must comply with Article 3 (commencing with Section 5930).

Comment. Section 5941 is comparable to Section 910(a) (General Corporation Law). It supersedes a portion of the first paragraph of former Section 3800, which was applicable to nonprofit corporations through former Section 9305. Unlike the former provision, Section 5941 requires the restated articles to omit the signatures and the names and addresses of initial directors.

Note. Section 910(a) of the business corporations law permits the restated articles to omit provisions of agreements of merger (other than amendments to the articles of the surviving corporation). We will consider this matter in connection with merger generally.

The staff revision deletes references to the initial agent, which is not required to be stated in the articles. The Commission has also tentatively determined not to include a statement of directors in the Section 6531 statement; Section 5941 may require revision or deletion accordingly.

368/251

§ 5942

Tentatively Approved
March 1976

§ 5942. Approvals required for restated articles

5942. (a) If the certificate of restated articles does not itself alter or amend the articles in any respect, it shall be approved by the board and shall be subject to the provisions of this chapter relating to an amendment of the articles which may be adopted by the board alone.

(b) If the certificate of restated articles does itself alter or amend the articles, it shall be subject to the provisions of this chapter relating to the amendment or amendments so made.

Comment. Section 5942 is the same in substance as Section 910(b) (General Corporation Law). It supersedes the second paragraph of former Section 3800, which was applicable to nonprofit corporations through former Section 9305. The phrase "approved by the board" is defined in Section 5151.

368/252

§ 5943

Tentatively Approved
March 1976

§ 5943. Effect of restated articles

5943. Restated articles filed pursuant to this article shall supersede for all purposes the original or previously restated articles and all amendments filed prior to the filing of the restated articles.

Comment. Section 5943 is the same in substance as Section 910(d) (General Corporation Law). It supersedes former Section 3802, which was applicable to nonprofit corporations through former Section 9305.

Note. The meaning of the phrase "for all purposes," and its effect on the original date of incorporation, have not yet been ascertained.

404/303

CHAPTER 10. SALES OF ASSETS

- § 6000. Hypothecation of assets to secure corporate obligation
- § 6001. Sale or transfer of all or substantially all of assets;
approval of members
- § 6002. Notice to Attorney General required in certain cases
- § 6003. Abandonment of proposed transaction
- § 6004. Certificate of resolution and approval; effect as evidence

999/540

§ 6000

Tentatively Approved
May 1976

CHAPTER 10. SALES OF ASSETS

§ 6000. Hypothecation of assets to secure corporate obligation

6000. (a) The board may approve any mortgage, deed of trust, pledge or other hypothecation of all or any part of the corporation's property, real or personal, for the purpose of securing the payment or performance of any contract or obligation.

(b) Unless the bylaws otherwise provide, no approval of the members shall be necessary for an action described in subdivision (a).

Comment. Section 6000 is the same in substance as Section 1000 (General Corporation Law) except that approval of the members may be required in the bylaws as well as in the articles. See Corp. Code § 5157 ("bylaws" means articles or bylaws).

992/924

§ 6001

Tentatively Approved
May 1976

§ 6001. Sale or transfer of all or substantially all of assets; approval of members

6001. (a) A nonprofit corporation may not sell, lease, convey, exchange, transfer, or otherwise dispose of all or substantially all of its assets unless the principal terms of the transaction are approved by the board and either (1) the transaction is in the usual and regular course of its activities or (2) the principal terms of the transaction are approved by members holding a majority of the voting power, whether such approval occurs before or after approval by the board or before or after the transaction.

§ 6002

(b) Subject to any limitations applicable to assets held on condition or on a charitable trust, a transaction authorized by subdivision (a) may be upon such terms and conditions and for consideration in such amount and in such form as the board may deem in the best interests of the nonprofit corporation.

Comment. Subdivision (a) of Section 6001 is the same in substance as the first sentence of subdivision (a) of Section 1001 (General Corporation Law). The term "activities" is used in lieu of the term "business" of Section 1001 as being more appropriate to a nonprofit corporation. The phrase "approved by members holding a majority of the voting power" is used in lieu of the phrase "approved by the outstanding shares" of Section 1001. See Corp. Code § 5194.5 ("voting power" defined). Member approval at a meeting is valid only if the "general notice of the proposal" was stated in the notice of the meeting or in a written waiver of notice. Corp. Code § 5628.

Subdivision (b) is the same in substance as subdivision (c) of Section 1001 except that it is made expressly subject to any limitations applicable to assets held on condition or on a charitable trust. Cf. Corp. Code §§ 5564 (Attorney General supervision of trust property), 7033 (disposition of assets held on trust or by charitable corporation).

968/877

§ 6002

Substance Tentatively Approved May 1976

§ 6002. Notice to Attorney General required in certain cases

6002. A nonprofit corporation shall give written notice to the Attorney General before consummating a transaction described in subdivision (a) of Section 6001 if all of the following conditions are met:

§ 6003

(a) The nonprofit corporation is organized for charitable purposes or any part of the assets are held subject to a charitable trust.

(b) The transaction is for less than fair and adequate consideration.

(c) The transaction is not in the usual and regular course of the activities of the nonprofit corporation.

Comment. Section 6002 is new and is designed to facilitate performance of the Attorney General's duty to supervise property subject to a charitable trust. See Corp. Code § 5564.

999/551

§ 6003

Tentatively Approved
May 1976

Renumbered May 1976

§ 6003. Abandonment of proposed transaction

6003. Notwithstanding approval by the members holding a majority of the voting power, the board may abandon a proposed transaction described in subdivision (a) of Section 6001 without further action by the members, subject to the contractual rights, if any, of third parties.

Comment. Section 6003 is the same in substance as subdivision (b) of Section 1001 (General Corporation Law).

Tentatively Approved
May 1976

§ 6004. Certificate of resolution and approval; effect as evidence

6004. (a) A deed or instrument conveying or otherwise transferring property of a nonprofit corporation may have annexed to it the certificate of the secretary or an assistant secretary of the nonprofit corporation, setting forth that the transaction has been validly approved by the board and stating either of the following:

(1) That the property described in the deed or instrument is less than substantially all of the assets of the nonprofit corporation or that the transfer is in the usual and regular course of the activities of the nonprofit corporation, if such is the case.

(2) If the property constitutes all or substantially all of the assets of the nonprofit corporation and the transfer is not in the usual and regular course of its activities, that the transfer has been approved pursuant to Section 6001 by members holding a majority of the voting power.

(b) The certificate is prima facie evidence of the existence of the facts authorizing the conveyance or other transfer of the property and is conclusive evidence thereof in favor of an innocent purchaser or encumbrancer for value.

Comment. Section 6004 is the same in substance as Section 1002 (General Corporation Law) except that the reference in Section 1002 to the chapter on reorganizations is omitted, since that chapter has not been carried over into General Nonprofit Corporation Law.

CHAPTER 11. MERGER AND CONSOLIDATION

Article 1. Agreement of Merger or Consolidation

- § 6110. Merger or consolidation of nonprofit corporations
- § 6111. Contents of agreement of merger or consolidation
- § 6112. Amendment of articles by agreement of merger
- § 6113. Articles of consolidated nonprofit corporation
- § 6114. Name of surviving or consolidated nonprofit corporation

Article 2. Approval of Agreement by Boards and Members

- § 6120. Approval of agreement by boards of constituent nonprofit corporations
- § 6121. Approval of agreement by members of constituent nonprofit corporations
- § 6122. Additional approval; prohibition against merger or consolidation forbidden
- § 6123. Members' approval before or after board's approval
- § 6124. Execution of certificate of approval; contents
- § 6125. Notice of approval of agreement

Article 3. Amendment and Abandonment of Agreement of Merger or Consolidation

- § 6130. Amendment of agreement
- § 6131. Abandonment of merger or consolidation

Article 4. Filing Agreement and Certificates; Effect of Filing

- § 6140. Filing copy of agreement and officers' certificates
- § 6141. Franchise Tax Board certificate of satisfaction
- § 6142. Notice to Attorney General; assets held on trust or by charitable corporation
- § 6143. Effect of merger
- § 6144. Effect of consolidation
- § 6145. Rights of creditors and liens preserved
- § 6146. Effect of merger or consolidation on bequest, devise, gift, etc.
- § 6147. Effect on pending actions or proceedings
- § 6148. Evidentiary effect of agreement
- § 6149. Effect of recording agreement

Article 5. Mergers and Consolidations Involving
Foreign Nonprofit Corporations

- § 6150. Merger or consolidation of domestic nonprofit corporation with foreign nonprofit corporation
- § 6151. Law governing surviving nonprofit corporation
- § 6152. Law governing consolidated nonprofit corporation
- § 6153. Law controlling merger or consolidation
- § 6154. Filing of agreement in case of domestic surviving or consolidated nonprofit corporation
- § 6155. Filing of papers filed in other state

Article 6. Action to Enjoin or Rescind Merger
or Consolidation

- § 6160. Limitation on action to test validity of merger or consolidation
- § 6161. Action to enjoin or rescind merger or consolidation
- § 6162. Limitation on action

Tentatively Approved
May 1976

CHAPTER 11. MERGER AND CONSOLIDATION

Article 1. Agreement of Merger or Consolidation

§ 6110. Merger or consolidation of nonprofit corporations

6110. Two or more nonprofit corporations may be merged into one nonprofit corporation, or consolidated into a new nonprofit corporation, as provided in this chapter.

Comment. Section 6110 is similar to former Section 4100. Under this chapter, nonprofit corporations may be merged only with other nonprofit corporations and not with business corporations. Similarly, nonprofit corporations may consolidate only with other nonprofit corporations and the resulting consolidated corporation must be nonprofit. Former Section 9700 incorporated the merger and consolidation provisions of the General Corporation Law except to the extent modified by the provisions of former Sections 9701-9703. Chapter 11 (commencing with Section 1100) of the General Corporation Law no longer provides for consolidation of business corporations. See Article 5 (commencing with Section 6150) for special provisions applicable where one of the constituent nonprofit corporations is a foreign nonprofit corporation. See Sections 5159 (defining "consolidated nonprofit corporation"), 5161 (defining "constituent nonprofit corporation"), 5165 (defining "disappearing nonprofit corporation"), and 5190 (defining "surviving nonprofit corporation").

Tentatively Approved
May 1976

§ 6111. Contents of agreement of merger or consolidation

6111. An agreement of merger or consolidation shall be prepared which states the following:

- (a) The terms and conditions of the merger or consolidation.
- (b) If the agreement is for a merger, the amendments to the articles of the surviving nonprofit corporation to be effected by the merger, if any.
- (c) The name of the surviving or consolidated nonprofit corporation and the name and place of incorporation of each disappearing nonprofit corporation.
- (d) The manner of converting the memberships in each of the constituent nonprofit corporations into memberships in the surviving or consolidated nonprofit corporation.
- (e) Other details and provisions as are desired, if any.

Comment. Section 6111 is derived from Section 1101 of the General Corporation Law and former Sections 4103 and 4105. Upon filing, the agreement of merger has the effect of amending the articles of the surviving nonprofit corporation in accordance with the statements prescribed by subdivision (b). See Section 6112. The name of the surviving or consolidated nonprofit corporation to be specified as provided in subdivision (c) may be the same as or similar to the name of a constituent nonprofit corporation. See Section 6114. It should be noted that the agreement may not provide for the distribution of assets to members upon merger or consolidation. See Section 5236.

969/045

§ 6112

Tentatively Approved
May 1976

§ 6112. Amendment of articles by agreement of merger

6112. If, in the case of a merger, the agreement provides for an amendment to the articles of the surviving nonprofit corporation, the amendment is subject to the provisions of Sections 5910, 5911, and 5932.

Comment. Section 6112 is the same in substance as a portion of subdivision (b) of Section 1101 of the General Corporation Law and the first paragraph of former Section 4105.

969/046

§ 6113

Substance Tentatively Ap-
proved May 1976

§ 6113. Articles of consolidated nonprofit corporation

6113. In the case of a consolidation, the articles of the consolidated nonprofit corporation shall be attached to the agreement of consolidation and considered a part of the agreement. The articles shall state the matters required by Section 5250 to be set forth in the articles.

Comment. Section 6113 is comparable to a portion of former Section 4104. Section 6113 provides for the separate statement of the proposed articles of the consolidated nonprofit corporation so that they are distinct from the other matters required to be stated in the agreement. However, for the purposes of approval and filing, the articles are considered to be part of the agreement of consolidation.

Revenue Act of 1954

Tentatively Approved
May 1976

§ 6114. Name of surviving or consolidated nonprofit corporation.

6114. Notwithstanding Section 14821, the name of the surviving or consolidated nonprofit corporation may be the same as or similar to the name of a constituent nonprofit corporation, whether domestic or foreign, and regardless of whether any such foreign nonprofit corporation is qualified to conduct intrastate business.

Comment. Section 6114 is the same in substance as a portion of subdivision (b) of Section 1101 of the General Corporation Law.

Tentatively Approved
May 1976

Article 2. Approval of Agreement By Boards and Members

§ 6120. Approval of agreement by boards of constituent nonprofit corporations

6120. The board of each constituent nonprofit corporation in a merger or a consolidation shall approve the agreement of merger or consolidation. Upon approval, the agreement shall be signed on behalf of each constituent nonprofit corporation by (1) its chairman of the board, president, or a vice president and (2) its secretary, chief financial officer, treasurer, an assistant secretary, or an assistant treasurer.

Comment. Section 6120 is the same in substance as a portion of Sections 1101 and 1102 of the General Corporation Law and a portion of former Section 4103. The persons who may sign the agreement are the same persons who may execute an officers' certificate pursuant to Section 5173.

Substance Tentatively Approved
May 1976

§ 6121. Approval of agreement by members of constituent nonprofit corporations

6121. Except as provided by Section 6122, the agreement of merger or consolidation shall be approved by the members of each constituent nonprofit corporation entitled to exercise a majority of the voting power.

Comment. Section 6121 is comparable to former Section 9701 but makes several changes. Compare Section 1201(a)(General Corporation Law). Section 6121 requires as a minimum that the agreement be approved by the members entitled to exercise a majority of the voting power, whether they act by a vote or by written consent. See Sections 5700 (manner of voting) and 5630 (written consents). Voting power is defined by Section 5194.5 as the vote of members entitled to vote for directors. Former law required a two-thirds vote where members acted by written consent and required approval of the members entitled to vote regardless of limitations or restrictions on the voting power of any class.

969/030

§ 6122

Substance Tentatively Approved May 1976

§ 6122. Additional approval; prohibition against merger or consolidation forbidden

6122. (a) The bylaws may require the approval of a greater percentage or fraction of the voting power than would otherwise be required under Section 6121.

(b) The bylaws may require the approval of members in addition to those entitled to exercise the voting power and the approval of the members voting by class.

(c) The bylaws may not prohibit a merger or consolidation authorized by this chapter.

Comment. Subdivisions (a) and (c) of Section 6122 continue the substance of former Section 9703. However, subdivision (a) permits the bylaws as well as the articles to require approval of a greater percentage of members. See Section 5157 ("bylaws" includes "articles"). Subdivision (b) is new.

Tentatively Approved
May 1976

§ 6123. Members' approval before or after board's approval

6123. The approval of the agreement of merger or consolidation by the members may be given either before or after the approval of the agreement by the board.

Comment. Section 6123 is the same in substance as the first sentence of subdivision (f) of Section 1201 of the General Corporation Law and former Section 4108.

Tentatively Approved
May 1976

§ 6124. Execution of certificate of approval; contents

6124. (a) After the agreement of merger or consolidation has been approved by the board and members of each constituent nonprofit corporation, the officers of each constituent nonprofit corporation shall execute an officers' certificate of approval.

(b) The officers' certificate of approval shall set forth the following:

(1) A statement that the agreement of merger or consolidation was approved by the board of that nonprofit corporation.

(2) A statement that the agreement of merger or consolidation was approved by the vote of the members of that nonprofit corporation which equaled or exceeded the vote required.

Comment. Section 6124 is the same in substance as a portion of Section 1103 of the General Corporation Law and is comparable to former Section 4110. After being executed, the officers' certificates of approval are filed separately or along with the certified copy of the agreement of merger or consolidation as provided by Section 6140. See Section 5173 ("officers' certificate" defined).

968/712 § 6125

Tentatively Approved
May 1976

§ 6125. Notice of approval of agreement

6125. When the agreement of merger or consolidation has been approved by the board and the members of a nonprofit corporation, each constituent nonprofit corporation shall give notice of the approval to each of its members in the manner provided for giving notice of meetings.

Comment. Section 6125 is similar to former Section 4109. See Section 5620 (bylaws may prescribe reasonable notice requirements).

Tentatively Approved
May 1976

Article 3. Amendment and Abandonment of Agreement
of Merger or Consolidation

§ 6130. Amendment of agreement

6130. (a) An amendment to the agreement of merger or consolidation may be adopted and approved in the same manner as the original agreement.

(b) If the amendment is approved, the agreement as amended shall be signed and the approval of the board and the members certified in the manner provided by Section 6124 for an original agreement.

Comment. Section 6130 is the same in substance as Section 1104 of the General Corporation Law and former Section 4111.

Tentatively Approved
May 1976

§ 6131. Abandonment of merger or consolidation

6131. The board of a constituent nonprofit corporation may, in its discretion, abandon a merger or consolidation, subject to the contractual rights of third parties, including other constituent nonprofit corporations, without any action by the members of the nonprofit corporation, at any time before the merger or consolidation has become effective.

Comment. Section 6131 is the same in substance as Section 1105 of the General Corporation Law and former Section 4112.

Tentatively Approved
May 1976

Article 4. Filing Agreement and Certificates;

Effect of Filing

§ 6140. Filing copy of agreement and officers' certificates

6140. (a) A copy of the agreement of merger or consolidation and the officers' certificates of approval of each constituent nonprofit corporation shall be filed. In the case of a merger, the nonprofit corporation that is to be the surviving nonprofit corporation shall file the copy of the agreement of merger and the officers' certificates of approval from all the constituent nonprofit corporations.

(b) Except as provided in Sections 6141 and 6142, and subject to Section 14831, the merger or consolidation is effective upon filing the copy of the agreement and the officers' certificates of approval.

(c) The Secretary of State may certify a copy of the agreement of merger or consolidation separate from any officers' certificates attached thereto.

Comment. Section 6140 is based on portions of Section 1103 of the General Corporation Law. Compare former Sections 4110 and 4113. See Sections 6111 (agreement of merger or consolidation), 6124 (officers' certificates of approval). As subdivision (b) makes clear, the merger or consolidation is effective upon filing, subject to a delayed effective date as provided in Section 14831 and subject to the requirements of Sections 6141 (Franchise Tax Board certificate of satisfaction) and 6142 (notice to Attorney General). The articles of a consolidated nonprofit corporation are filed as a part of the agreement of consolidation. See Section 6113.

Tentatively Approved
May 1976

§ 6141. Franchise Tax Board certificate of satisfaction

6141. Each disappearing nonprofit corporation which is subject to the Bank and Corporation Tax Law shall file a certificate of satisfaction of the Franchise Tax Board to the effect that all taxes imposed by the Bank and Corporation Tax Law have been paid or secured. The agreement of merger or consolidation shall not be filed by the Secretary of State until such certificate of satisfaction is filed.

Comment. Section 6141 is the same in substance as a portion of Section 1103 of the General Corporation Law and former Section 4113. See Section 5165 ("disappearing nonprofit corporation" defined).

Tentatively Approved
May 1976

§ 6142. Notice to Attorney General; assets held on trust or by charitable corporation

6142. Where a constituent nonprofit corporation holds assets on a charitable trust or is organized for charitable purposes, a copy of the agreement of merger or consolidation shall be filed with the Attorney General before the agreement is filed with the Secretary of State or, if the agreement is filed with a delayed effective date pursuant to Section 14831, before such date. An officers' certificate of such filing with the Attorney General shall be filed with the Secretary of State. The

agreement of merger or consolidation shall not be filed by the Secretary of State until such officers' certificate is filed.

Comment. Section 6142 is new. By providing for notice to the Attorney General of the proposed merger or consolidation of a charitable corporation or a nonprofit corporation holding assets on charitable trust, Section 6142 seeks to provide the Attorney General with the information needed to enforce the supervisory responsibilities over charitable trusts. See Section 5564; Govt. Code § 12580 et seq. (Uniform Supervision of Trustees for Charitable Purposes Act). Where more than one constituent nonprofit corporation holds assets on charitable trust or is organized for charitable purposes, Section 6142 requires only one copy of the agreement of merger or consolidation to be filed with the Attorney General and one certificate of filing to be filed with the Secretary of State.

043/193

§ 6143

Tentatively Approved
May 1976

§ 6143. Effect of merger

6143. On the effective date of a merger:

(a) The separate existence of the disappearing nonprofit corporation ceases.

(b) The surviving nonprofit corporation succeeds, without other transfer, to all the rights and property of each of the disappearing nonprofit corporations.

(c) The surviving corporation is subject to all the debts and liabilities of each disappearing nonprofit corporation in the same manner as if the surviving nonprofit corporation had itself incurred them.

Comment. Section 6143 is the same in substance as subdivision (a) of Section 1107 of the General Corporation Law and the first paragraph of former Section 4116.

043/194

§ 6144

Tentatively Approved
May 1976

§ 6144. Effect of consolidation.

6144. On the effective date of a consolidation:

- (a) The separate existence of each of the disappearing nonprofit corporations ceases.
- (b) The consolidated nonprofit corporation succeeds, without other transfer, to all the rights and property of each of the disappearing nonprofit corporations.
- (c) The consolidated nonprofit corporation is subject to all the debts and liabilities of each disappearing nonprofit corporation in the same manner as if the consolidated nonprofit corporation had itself incurred them.

Comment. Section 6144 continues the substance of the first paragraph of former Section 4116. It should be noted that, in the case of a consolidation, all the constituent nonprofit corporations are disappearing nonprofit corporations.

043/195

§ 6145

Tentatively Approved
May 1976

§ 6145. Rights of creditors and liens preserved

6145. Rights of creditors against, and liens upon the property of, a disappearing nonprofit corporation are preserved unimpaired. A lien upon the property of a disappearing nonprofit corporation is limited to the property affected thereby immediately prior to the time the merger or consolidation becomes effective.

Comment. Section 6145 is the same in substance as subdivision (b) of Section 1107 of the General Corporation Law and the second paragraph of former Section 4116.

999/320

§ 6146

Tentatively Approved
May 1976

§ 6146. Effect of merger or consolidation on bequest, devise, gift, etc.

6146. Any bequest, devise, gift, grant, or promise contained in a will or other instrument of donation, subscription, or conveyance, which is made to a constituent nonprofit corporation and which is to take effect or remain payable after the merger or consolidation of two or more nonprofit corporations pursuant to this chapter, inures to the surviving or consolidated nonprofit corporation.

Comment. Section 6146 continues the substance of former Section 10206.1.

Tentatively Approved
May 1976

§ 6147. Effect on pending actions or proceedings

6147. (a) An action or proceeding pending by or against a disappearing nonprofit corporation may be prosecuted to judgment, which binds the surviving or consolidated nonprofit corporation.

(b) The surviving or consolidated nonprofit corporation may be proceeded against or substituted in place of a disappearing nonprofit corporation.

Comment. Section 6147 is the same in substance as subdivision (c) of Section 1107 of the General Corporation Law and the last paragraph of former Section 4116.

Tentatively Approved
May 1976

§ 6148. Evidentiary effect of agreement

6148. A copy of an agreement of merger or consolidation, certified on or after its effective date by the Secretary of State or an authorized public official of the state or place pursuant to the laws of which the merger or consolidation is effected who has custody thereof, has the same force in evidence as the original and, except as against the state, is conclusive evidence of the performance of all conditions precedent to the merger or consolidation, the existence on the effective date of the surviving or consolidated nonprofit corporation, and the performance of

the conditions necessary to the adoption of any amendment to the articles of the surviving nonprofit corporation contained in the agreement of merger.

Comment. Section 6148 is comparable to Section 1106 of the General Corporation Law and former Section 4115.

405/769

§ 6149

Tentatively Approved
May 1976

§ 6149. Effect of recording agreement

6149. Where a merger or consolidation takes place under the laws of this state or under the laws of a state or place providing substantially that the making and filing of the agreement of merger or consolidation vests in the surviving or consolidated nonprofit corporation all the real property of the disappearing nonprofit corporation, the filing for record in the office of the county recorder of a county in this state in which real property of the disappearing corporation is located of either (1) a certificate prescribed by the Secretary of State or (2) a copy of the agreement of merger or consolidation, certified by the Secretary of State or authorized public official of the state or place pursuant to the laws of which the merger or consolidation is effected, evidences record ownership in the surviving or consolidated nonprofit corporation of all interest of the disappearing nonprofit corporation in the real property located in that county.

Comment. Section 6149 is the same in substance as Section 1109 of the General Corporation Law. Compare former Sections 4114 and 4122.

405/770

§ 6150

Tentatively Approved
May 1976

Article 5. Mergers and Consolidations Involving
Foreign Nonprofit Corporations

§ 6150. Merger or consolidation of domestic nonprofit corporation with foreign nonprofit corporation

6150. The merger or consolidation of a domestic nonprofit corporation with a foreign nonprofit corporation may be effected if the foreign nonprofit corporation is authorized by the laws under which it is formed to effect a merger or consolidation.

Comment. Section 6150 is the same in substance as the first sentence of subdivision (a) of Section 1108 of the General Corporation Law and the first paragraph of former Section 4118.

405/790

§ 6151

Tentatively Approved
May 1976

§ 6151. Law governing surviving nonprofit corporation

6151. In the case of merger of a domestic and a foreign nonprofit corporation, the surviving nonprofit corporation may be any one of the constituent nonprofit corporations and continues to exist under the laws of the state or place of its incorporation.

Comment. Section 6151 is the same in substance as the second sentence of subdivision (a) of Section 1108 of the General Corporation Law and the second sentence of the second paragraph of former Section 4118.

Tentatively Approved
May 1976

§ 6152. Law governing consolidated nonprofit corporation

6152. In the case of consolidation of a domestic and a foreign nonprofit corporation, the consolidated nonprofit corporation may be a nonprofit corporation organized under the laws of the state or place under which any one of the constituent nonprofit corporations is incorporated.

Comment: Section 6152 continues the substance of the first sentence of the second paragraph of former Section 4118.

Tentatively Approved
May 1976

§ 6153. Law controlling merger or consolidation

6153. (a) If the surviving nonprofit corporation or the consolidated nonprofit corporation is to be a domestic nonprofit corporation, the merger or consolidation proceedings with respect to such nonprofit corporation and any domestic disappearing nonprofit corporation shall conform to the provisions of this chapter.

(b) If the surviving nonprofit corporation or the consolidated nonprofit corporation is to be a foreign corporation, the merger or consolidation proceedings may be in accordance with the laws of the state or place of incorporation of the surviving nonprofit corporation or of proposed incorporation of the consolidated nonprofit corporation. The

requirements of Section 6121 and subdivision (a) of Section 6155 shall be satisfied with respect to any domestic disappearing nonprofit corporation.

Comment. Section 6153 is the same in substance as subdivision (b) of Section 1108 of the General Corporation Law and the third paragraph of former Section 4118. Subdivision (b) makes clear that, even where the merger or consolidation is to be governed by the law of another state, the provisions concerning membership approval (Section 6121) continue to apply to a disappearing domestic nonprofit corporation, and the papers filed in the other state must also be filed in this state pursuant to subdivision (a) of Section 6155.

405/783

§ 6154

Tentatively Approved

May 1976

§ 6154. Filing of agreement in case of domestic surviving or consolidated nonprofit corporation

(a) If the surviving nonprofit corporation or the consolidated nonprofit corporation is to be a domestic nonprofit corporation, a copy of the agreement of merger or consolidation and the certificate of approval of each domestic or foreign constituent nonprofit corporation shall be filed.

(b) Except as provided in Sections 6141 and 6142, and subject to Section 14831, the merger or consolidation is effective as to the domestic nonprofit corporation upon filing.

Comment. Section 6154 is based on subdivision (c) of Section 1108 of the General Corporation Law and a portion of the first paragraph of

former Section 4119. Subdivision (b) makes clear that the Franchise Tax Board certificate of satisfaction and an officers' certificate of notice to the Attorney General may be required. See Sections 6141 and 6142. The filing of the agreement pursuant to Section 6154 has the effect of surrendering any foreign disappearing nonprofit corporation's right to conduct intrastate business. See Section 14870(b).

405/785

§ 6155

Tentatively Approved
May 1976

§ 6155. Filing of papers filed in other state

6155. (a) If the surviving nonprofit corporation or the consolidated nonprofit corporation is to be a foreign nonprofit corporation, a copy of the agreement of merger or consolidation and of the officers' certificates of approval or other document filed by the foreign surviving or consolidated nonprofit corporation in the state or place of its incorporation shall be filed as to a domestic disappearing nonprofit corporation. The copy shall be certified by the public officer of such other state or place having official custody of the original or, in lieu thereof, an executed counterpart of such agreement, certificate, or other document.

(b) Except as provided by Sections 6141 and 6142, and subject to Section 14831, the merger or consolidation is effective as to the domestic nonprofit corporation upon filing.

Comment. Section 6155 is based on subdivision (d) of Section 1108 of the General Corporation Law and a portion of the second paragraph of

former Section 4119. Subdivision (b) makes clear that the Franchise Tax Board certificate of satisfaction and an officers' certificate of notice to the Attorney General may be required. See Sections 6141 and 6142. The filing of an agreement of merger or consolidation as to a domestic disappearing nonprofit corporation has the effect of surrendering any foreign disappearing nonprofit corporation's right to conduct intrastate business. See Section 14370(b). If no such agreement is filed in this state, any foreign disappearing nonprofit corporation which has qualified to conduct intrastate business is required to file a certificate of surrender of that right. See Section 14370(c).

Staff draft

June 1976

Article 6. Action to Enjoin or RescindMerger or Consolidation§ 6160. Limitation on action to test validity of merger or consolidation

6160. Except as provided in Section 6161, no member of a nonprofit corporation has a right at law or in equity to attack the validity of a merger or consolidation or to have the merger or consolidation set aside or rescinded except in an action to test whether the number of memberships required to approve the agreement of merger or consolidation have been legally voted in favor thereof.

Comment. Section 6160 is derived from a portion of subdivision (a) of Section 1312 of the General Corporation Law and a portion of former Section 4123. It should be noted that the exception provided in Section 6161 permits an action to enjoin or rescind a merger or consolidation only in very limited circumstances. There is no right to require the nonprofit corporation to purchase the memberships of dissenting members.

Substance Tentatively Approved
May 1976§ 6161. Action to enjoin or rescind merger or consolidation

6161. An action to enjoin or rescind a merger or consolidation which is manifestly unfair to the property rights of a member or a class of members may be brought by a member whose rights are or will be af-

ected and who holds a membership that satisfies both of the following requirements:

(a) The membership was held of record on the date for the determination of memberships entitled to be voted on the agreement of merger or consolidation.

(b) The membership was not voted in favor of the agreement of merger or consolidation.

Comment. Section 6161 is new. It gives a member a right to bring an action to enjoin or rescind a merger or consolidation that would adversely affect his property rights so long as the member did not approve the merger or consolidation.

404/791

§ 6162

Staff: draft

June 1976

§ 6162. Limitation on action

6162. No action pursuant to Section 6161 to enjoin or rescind a merger or consolidation may be commenced more than 60 days after the effective date of the merger or consolidation.

Comment. Section 6162 is new; it places a time limit upon the bringing of actions pursuant to Section 6161.

999/336

CHAPTER 14. BANKRUPTCY REORGANIZATIONS AND ARRANGEMENTS

- § 6400. General power to carry out reorganization or arrangement under federal law
- § 6401. Specific powers
- § 6402. Filing of certificates and agreements
- § 6403. Execution and verification of certificates and agreements; contents
- § 6404. Filing fees
- § 6405. Applicability of chapter

CHAPTER 14. BANKRUPTCY REORGANIZATIONS AND ARRANGEMENTS

Note. Chapter 14 has been tentatively approved subject to review by the Commission's consultant on creditors' remedies.

§ 6400. General power to carry out reorganization or arrangement under federal law

6400. (a) A domestic nonprofit corporation with respect to which a proceeding has been initiated under any applicable statute of the United States, as now existing or hereafter enacted, relating to reorganizations or arrangements of corporations, has the power to carry out a plan of reorganization or arrangement and the orders of the court entered in the proceeding without further action by the board or members.

(b) The power described in subdivision (a), whether exercised by a trustee or a majority of trustees, a master, or other representative appointed by the court or by the officers of the nonprofit corporation designated by the court, shall be exercised with like effect as if exercised by unanimous action of the board and members.

Comment. Section 6400 continues the substance of subdivision (a) of Section 1400 of the General Corporation Law and former Section 4400. The language has been simplified, but no substantive change is intended.

Chapter 14 continues the substance of former Sections 4400-4405 relating to bankruptcy reorganizations and arrangements which were applicable to nonprofit corporations through former Section 9002.

§ 6401. Specific powers

6401. Without limiting the generality or effect of Section 6400, a nonprofit corporation subject to reorganization or arrangement proceedings described in Section 6400 may do any of the following:

- (a) Amend its articles.
- (b) Alter, amend, or repeal its bylaws.
- (c) Constitute or reconstitute its board and name, or constitute or appoint directors and officers in place of or in addition to all or some of the directors or officers then in office.
- (d) Make any other amendment, change, alteration, or provision authorized by this division.
- (e) Dissolve, transfer all or part of its assets, or merge or consolidate as permitted by this division.
- (f) Change the location of its principal executive office or remove or appoint an agent to receive service of process.
- (g) Authorize and fix the terms, manner, and conditions of the issuance of bonds, debentures, or other obligations.
- (h) Lease its property and franchises to any business or nonprofit corporation, if permitted by law.

Comment. Section 6401 is the same in substance as subdivision (a) of Section 1400 of the General Corporation Law and former Section 4401. However references to "shareholders" have been changed to "members" and references to shares of stock and statutory dissenters' rights have been deleted.

§ 6402. Filing of certificates and agreements

6402. A certificate of any amendment, change, alteration, or dissolution or an agreement of merger or consolidation made by a nonprofit corporation pursuant to Section 6400 or 6401, executed as provided in Section 6403, shall be filed and upon filing is effective in accordance with its terms and the provisions of this chapter.

Comment. Section 6402 is substantively identical to subdivision (a) of Section 1401 of the General Corporation Law and the first sentence of former Section 4402. The second sentence of former Section 4402, which provided for the filing of a certified copy of the certificate in counties where the corporation holds real property and where the principal office is located, has not been continued.

§ 6403. Execution and verification of certificates and agreements;
contents

6403. A certificate, agreement, or other instrument filed pursuant to Section 6402:

(a) Shall be signed and verified by the person described in Section 6400 who is authorized by the court to exercise the powers of the nonprofit corporation.

(b) Shall state that provision for the making of the certificate, agreement, or instrument is contained in an order of a court having jurisdiction of a proceeding under a statute of the United States for the reorganization or arrangement of corporations, and shall identify the order.

Comment. Section 6403 is the same in substance as subdivision (b) of Section 1401 of the General Corporation Law.

§ 6404. Filing fees

6404. The fee for filing any paper pursuant to this chapter is the same as the fee payable for the filing of a like paper by a nonprofit corporation that is not in reorganization or arrangement proceedings.

Comment. Section 6404 is the same in substance as Section 1403 of the General Corporation Law.

§ 6405. Applicability of chapter

6405. This chapter ceases to apply to a nonprofit corporation upon the entry of a final decree in the reorganization or arrangement proceeding closing the case and discharging the trustee or trustees, if any, whether or not jurisdiction is retained thereafter by the court for limited purposes which do not relate to the consummation of the plan.

Comment. Section 6405 is substantively identical to Section 1402.

Substance Tentatively Approved March 1976

Revised April 1976

CHAPTER 15. RECORDS AND REPORTS

Article 1. Books and Records Generally.

§ 6510. Required books and records

6510. Each nonprofit corporation shall keep:

- (a) Adequate and correct books and records of account.
- (b) Minutes of the proceedings of members, board, and committees of the board.
- (c) A record of members, which shall include (1) the name and address of each member, (2) where a member may hold more than one membership, the number of memberships held by each member, (3) where there is more than one class of memberships, the class of each membership held by each member, and (4) the date when the member became a holder of record of each membership.
- (d) A record of the termination of each membership, together with the date of termination, if such a record is necessary to determine those members entitled to vote or otherwise to participate in the affairs of the nonprofit corporation.
- (e) A record of the holders of capital certificates, which shall include (1) the name and address of each holder, (2) the number and amount of capital certificates held by each holder, and (3) the date when the holder became a holder of record of each capital certificate.

Comment. Section 6510 is comparable to the first sentence of Section 1500 (General Corporation Law).

Subdivision (c) is drawn from Section 1500 and from Section 621(a) of the New York Not-for-Profit Corporation Law. Subdivision (c)(4), which requires that the record of members show the date when the member became the holder of record of the membership, is taken from the New York section; this is a new requirement for nonprofit corporations, and no comparable requirement is found in Section 1500.

Subdivision (d), which requires a record of termination of memberships if such a record is needed for the purposes of the nonprofit corporation, is drawn from former Section 9606 which applied to nonprofit corporations. However, Section 9606 apparently required that the record of termination of memberships be retained forever.

The record of the date when a member became a holder of record and the record of termination of memberships are required primarily so that the record of members will be sufficient to determine the members as of any relevant record date. See Section 5701.

Subdivision (e) is new. For the provisions relating to capital certificates, see Sections [to be supplied later].

Cross-Reference:

Bylaws, place where kept, § 5266

Note. The provision relating to capital certificates will be retained only if the Commission determines to provide for capital certificates. This matter has not yet been considered.

405/756

§ 6511

Tentatively Approved March 1976

Revised April 1976

§ 6511. Form of records; place where kept

6511. (a) The minutes shall be kept in written form. The other books and records required by Section 6510 shall be kept either in

written form or in any other form capable of being converted into written form:

(b) The records described in subdivisions (c) and (d) of Section 6510 shall be kept by the nonprofit corporation at its principal executive office or at the office of its registrar.

Comment. Subdivision (a) of Section 6511 is the same in substance as the last two sentences of Section 1500 (General Corporation Law). Sections 6510 and 6511 supersede former Section 9606 which required every nonprofit corporation to keep a "membership book." Nothing in this article prevents a nonprofit corporation from continuing to keep its record of members in a membership book. However, Section 6511 permits the membership record to be kept in any other written form or in any other form capable of being converted into written form. Whatever the form of the membership record, the record must be sufficient to determine the information required by subdivisions (c) and (d) of Section 6510 as of any relevant record date. See Section 5701.

Subdivision (b) is consistent with Section 1500.

Cross-References:

Duty to convert records into written form, § 6612

"Written" defined, § 5195

405/133

§ 6512

Tentatively Approved March 1976

Renumbered April 1976

§ 6512. Liability for false report, record, or entry

6512. An officer, director, employee, or agent of a nonprofit corporation who does any of the following is liable jointly and sever-

ally for all the damages resulting therefrom to the nonprofit corporation or to any person injured thereby who relied thereon or to both:

(a) Makes, issues, delivers, or publishes any report, circular, certificate, financial statement, balance sheet, public notice, or document respecting the nonprofit corporation or its memberships, assets, liabilities, capital, activities, revenues, receipts, or accounts which is false in any material respect, knowing it to be false, or participates in the making, issuance, delivery, or publication thereof with knowledge that the same is false in a material respect.

(b) Makes or causes to be made in the books, minutes, records, or accounts of a nonprofit corporation any entry which is false in any material particular knowing such entry is false.

(c) Removes, erases, alters, or cancels any entry in any books or records of the nonprofit corporation, with intent to deceive.

Comment. Section 6512 is the same in substance as Section 1507 (General Corporation Law) except for changes made to reflect the fact that a nonprofit corporation does not issue shares of stock.

Tentatively Approved March 1976

Technical Revision April 1976

Article 2. Annual Report; Financial Statements§ 6520. Annual report required unless bylaws otherwise provide

6520. Except to the extent the bylaws otherwise provide, a non-profit corporation is subject to the requirements of Sections 6521 to 6525, inclusive.

Comment. Section 6520 makes the provisions of this article relating to annual reports applicable to nonprofit corporations except to the extent the bylaws contain inconsistent provisions. Thus, for example, the bylaws may dispense entirely with the requirement of an annual report or may provide for an annual report that contains different or more or less information than is required by this article. Likewise, the bylaws may require that a copy of the annual report be mailed to each member rather than be presented at the annual meeting of members as required by this article. As to the application of this article to foreign nonprofit corporations, see Section 6529 and Section [2115].

Cross-Reference:

Bylaws, provisions concerning annual report, § ____ [provision based on Section 212(b)(8)].

Tentatively Approved March 1976

§ 6521. Presentation of annual report

6521. The board shall prepare and present at the annual meeting of members an oral or written annual report as provided in this article.

The annual report, if written, shall be filed with the records of the nonprofit corporation. Either a copy or a summary of the annual report shall be entered in the minutes of the proceedings of the annual meeting of members.

Comment. Section 6521 requires an annual report unless this requirement is waived in the bylaws. See Section 6520. Section 6521 is comparable to subdivision (a) of Section 1501 (General Corporation Law), but the provision authorizing waiver of the annual report requirement for business corporations is limited to a corporation with less than 100 holders of records of its shares. Any nonprofit corporation may waive the requirement of an annual report by an appropriate provision in its bylaws and, unlike the comparable provision of Section 1501, the authority to waive the requirement of an annual report is not limited to nonprofit corporations with less than a specified number of members.

Former Section 9402 provided that the bylaws of a nonprofit corporation might make provision for the making of annual reports and financial statements to members, but this was not a mandatory requirement. As to charitable corporations, see the Comment to Section 6527.

Section 6521 requires the annual report to be presented at the annual meeting of members and, if written, to be filed with the records of the nonprofit corporation, and either a copy or summary thereof entered in the minutes. These requirements are drawn from Section 519 of the New York Not-for-Profit Corporation Law except that the New York section requires a written annual report whereas Section 6521 permits an oral annual report as well. The requirement of Section 1501 that a copy of the annual report of a business corporation be sent to each shareholder is not carried over into the nonprofit corporation law in order to avoid the expense of duplicating and mailing copies of the annual reports to all the members of the nonprofit corporation. However, nothing in this article prevents the nonprofit corporation from sending each member a copy of its annual report; and, if the nonprofit corporation prepares and presents a written annual report at the annual meeting of members, the nonprofit corporation is required by Section 6524 either

to send a copy to a member upon written request or to permit the member to examine a copy of the annual report. See also Sections 6526(b), 6528(a). In addition, even if the bylaws dispense with the requirements of this article, Section 6526 provides a procedure whereby five percent or more of the members may obtain comparable information.

Cross-References:

Bylaws, provisions concerning annual reports, [provision comparable to § 212(b)(3)]

Nonprofit corporation without members, § 6525

406/250

§ 6522

Substance Tentatively Approved March 1976

Revised April 1976

§ 6522. Annual report; financial information

6522. (a) As used in this section, "report date" means a date which is the end of a fiscal year terminating not more than 12 months prior to the date of the annual meeting.

(b) The annual report shall show all of the following:

(1) The assets (including any held in trust) and liabilities of the nonprofit corporation as of the report date.

(2) The major changes in assets (including any held in trust) and liabilities during the fiscal year ending on the report date.

(3) The revenue or receipts of the nonprofit corporation, both unrestricted and restricted to particular purposes, for the fiscal year ending on the report date.

(4) The expenses or disbursements of the nonprofit corporation, for both general and restricted purposes, during the fiscal year ending on the report date.

(c) The statements required by subdivision (b) shall be accompanied by a report thereon of independent accountants or, if there is no such report, the certificate of an authorized officer of the nonprofit corporation that such statements were prepared without audit from the books and records of the nonprofit corporation.

Comment. Section 6522 applies unless the bylaws otherwise provide. See Section 6520. Section 6522 adopts the substance of provisions of Section 519 of the New York Not-for-Profit Corporation Law. Subdivision (c), which is not found in the New York law, is the same in substance as the last portion of subdivision (a) of Section 1501 (General Corporation Law). The initial annual report may be for a fiscal year of less than 12 months, but the annual reports thereafter would be for a 12-month fiscal year.

Definitions:

Independent accountant, § 5115

Comparable Provisions:

Section 1501(a)

New York Not-for-Profit Corporation Law § 519

Pennsylvania Nonprofit Corporation Law § 7555

406/252

§ 6523

Not Approved

§ 6523. Additional required information

6523. The annual report shall also include:

Note. This section will contain provisions comparable to subdivision (b) of Section 1500 if such provisions are determined to be appropriate after the subject matter of those provisions has been considered.

406/253

§ 6524

Tentatively Approved March 1976

Revised and Renumbered April 1976

§ 6524. Member's right to examine copy of annual report

6524. If a written annual report was prepared and presented to the immediately preceding annual meeting of members, upon written request of a member, the nonprofit corporation shall, at its option, either:

- (a) Make a copy of the annual report reasonably available for examination by the member; or
- (b) Mail a copy of the annual report to the member.

Comment. Section 6524 applies unless the bylaws otherwise provide. See Section 6520. Section 6524 provides a means whereby a member may examine a copy of the annual report. It permits the nonprofit corporation, at its option, to mail a copy of the annual report to the member instead of permitting the examination.

406/254

§ 6525

Tentatively Approved March 1976

Revised and Renumbered April 1976

§ 6525. Corporation having no members

6525. The board of a nonprofit corporation having no members shall direct the chief executive officer and chief fiscal officer to present at the annual meeting of the board a report in accordance with this article. This report shall be filed with the minutes of the annual meeting of the board.

Comment. Section 6525 is the same in substance as a provision of Section 519 of the New York Not-for-Profit Corporation Law. The section applies unless the bylaws otherwise provide. See Section 6520.

Comparable Provisions:

New York Not-for-Profit Corporation Law § 519

Pennsylvania Nonprofit Corporation Law § 7555

405/961

§ 6526

Substance Tentatively Approved March 1976

Revised and Renumbered April 1976

§ 6526. Members' right to obtain fiscal information

6526. (a) As used in this section, "authorized member" means a member authorized in writing by members holding not less than five percent of the voting power.

(b) If a written annual report was presented at the immediately preceding annual meeting of members in compliance with Sections 6521 to

6523, inclusive, the nonprofit corporation shall deliver or mail a copy of such annual report to any authorized member who makes a written request for a copy. The report shall be delivered or mailed to the member making the request within 10 days after the nonprofit corporation receives the request.

(c) If the nonprofit corporation did not present a written annual report at the last immediately preceding annual meeting of members in compliance with Sections 6521 to 6523, inclusive, an authorized member may make a written request to the nonprofit corporation for a statement containing the information specified in Section 6522 that would have been included in the annual report if one had been prepared and presented at the immediately preceding annual meeting of members.

(d) An authorized member may make a written request to the nonprofit corporation for a statement containing information comparable to that specified in Section 6522 for a period specified in the request ending not less than 30 days prior to the date of the request. Unless the nonprofit corporation and the member making the request otherwise agree, the period specified in the request shall commence immediately upon the end of the period covered by the annual report referred to in subdivision (b) or the statement referred to in subdivision (c), as the case may be, and shall be for a period of three months or a multiple of three months.

(e) Except as provided in subdivision (f), the nonprofit corporation shall deliver or mail to the member making the request the statement or statements requested within 30 days after the nonprofit corporation receives the request.

(f) In lieu of providing the requested statements, the nonprofit corporation may, within 10 days after it receives the request, respond to the request by delivering or mailing to the member making the request a statement that the nonprofit corporation elects to open its books and records of account to inspection under Chapter 16 (commencing with Section 6610) of Division 2 of the Corporations Code and that such books and records of account will be made available to the member or his agent or attorney for inspection during usual business hours at an address specified in the statement. This subdivision applies only if the address specified in the statement is in this state and is either (1) an address within the county where the principal executive office of the nonprofit corporation is located or (2) an address within the county where the principal business office of the nonprofit corporation in this state is located if the address of its principal executive office is not in this state.

(g) The statements referred to in subdivisions (c) and (d) shall be accompanied by a report thereon, if any, by an independent accountant engaged by the nonprofit corporation or the certificate of an authorized officer of the nonprofit corporation that such statements were prepared without audit from the books and records of the nonprofit corporation.

(h) A copy of the statements prepared pursuant to subdivisions (c) and (d) shall be kept on file in the principal office of the nonprofit corporation for 12 months, and they shall be exhibited at all reasonable times to any member demanding an examination of them. A copy of the statements shall be mailed to any member requesting a copy upon payment by the member of such reasonable charge as the nonprofit corporation may

impose to cover the cost of reproducing the copy of the statements and mailing the copy to the member.

Comment. Section 6526 is generally comparable to subdivisions (c), (d), and (e) of Section 1501 (General Corporation Law), but there are significant differences between Section 6526 and the comparable provisions of Section 1501. Nothing in Section 6526 limits the right of a member under Section 6630 to inspect the financial records of the nonprofit corporation for a "purpose reasonably related to such member's interests as a member." Inspection of the financial records may be necessary to determine, for example, whether a financial statement obtained under Section 6526 is accurate or to obtain information concerning the member's own account or for some other proper purpose. See the Comment to Section 6630.

Subdivision (a) defines "authorized member" by adopting a five-percent-of-the-voting-power requirement. This requirement is comparable to the five-percent-of-outstanding-shares requirement of subdivision (c) of Section 1501 (General Corporation Law).

Subdivision (b) gives an authorized member—defined in subdivision (a)—an absolute right to obtain a copy of the annual report if a written annual report was presented at the immediately preceding annual meeting in compliance with Sections 6521-6523. Compare Section 6524 (right of member to examine copy of annual report). Subdivision (b) does not apply if an oral annual report was presented at the annual meeting (as permitted by Section 6521) or if the bylaws dispense with the requirements of Sections 6521-6523 (see Section 6520) or if the nonprofit corporation failed to comply with Sections 6521-6523. Where subdivision (b) does not apply, the authorized member can obtain comparable information pursuant to subdivision (c). See also Section 6528.

Subdivisions (c), (d), and (e) are very similar to the first two sentences of subdivision (c) of Section 1501 (General Corporation Law). No provision similar to subdivision (f) is found in Section 1501; this subdivision is included in recognition of the fact that a nonprofit corporation frequently will not prepare fiscal statements with the regularity of business corporations. Subdivision (g) is the same in

substance as subdivision (e) of Section 1501. Subdivision (h) is similar to subdivision (d) of Section 1501 except that a nonprofit corporation is permitted to impose a reasonable charge to cover the cost or reproducing and mailing copies of fiscal statements. No charge is authorized, however, under subdivision (e) to cover the cost of providing the member who made the original request with the statement or statements requested. The nonprofit corporation is permitted to impose a charge for subsequent copies of statements so that possible abuse of the right to obtain subsequent copies can be limited. Absent a charge, it is possible that each of the members who give the original written authorization (five percent or more of the voting power) might make such requests, probably in the original written authorization, and thus impose an undue financial burden on the nonprofit corporation.

Policy Issues:

Do members of nonprofit corporations need a method of obtaining fiscal information similar to that provided members of business corporations under Section 1501? Decision: Yes.

Is the five-percent-of-members-authorization requirement appropriate as a condition for requiring the nonprofit corporation to prepare the necessary fiscal statements? Decision: Yes.

Should the nonprofit corporation be permitted to elect to open its books and records of account to inspection as an alternative to providing the requested statements? Decision: Yes.

Should this election be limited to cases where the books and records of account are open to examination in California? Decision: Yes.

Should the nonprofit corporation be permitted to charge members for copies of statements provided pursuant to this section, (the member making the original request is not charged for the statement)? Decision: Yes.

Note. Should the office referred to in subdivision (h) be in "principal executive office" or "principal office in this state?"

Note. "Voting power" is a term to be defined later. The use of the term in this section will be reviewed when the definition is drafted.

Tentatively Approved March 1976

Renumbered April 1976

§ 6527. Reports to Attorney General not affected

6527. Nothing in this article relieves a nonprofit corporation from the requirements of Section 12586 of the Government Code. If the report sent to the Attorney General in compliance with the requirements of Section 12586 of the Government Code includes the information required by this article, that report shall be deemed to satisfy the requirements of this article if a copy of the report sent to the Attorney General is entered in the minutes of the proceedings of the annual meeting of members.

Comment. Section 6527 makes clear the relationship of the requirements of this article and the requirement imposed by Government Code Section 12586 that reports be made to the Attorney General by charitable corporations and those which hold property in trust or accept property to be used for a charitable purpose. Nothing in this article relieves such a corporation from complying with the requirement imposed by Government Code Section 12586 that the corporation make the reports required by the Attorney General. However, if the report made by such a corporation to the Attorney General includes the information required by this article, a separate report need not be prepared in order to comply with the requirements of this article.

Substance Tentatively Approved March 1976

Revised and Renumbered April 1976

§ 6528. Judicial enforcement

6528. (a) The superior court of the proper county shall enforce the duty of making the annual report required by this article. If the annual report was not prepared and presented at the immediately preceding annual meeting as required by this article, the court shall enforce the duty of making the annual report by making an order that requires the nonprofit corporation to do all of the following:

- (1) Prepare a written report that satisfies the requirements of this article for an annual report for such annual meeting and deliver such report to the member within such time as the court specifies.
- (2) Not more than 10 days after delivery of the written report to the member, enter a copy of the report in the minutes of the proceedings of the annual meeting at which the annual report should have been presented.
- (3) Comply with the duty of making the annual report required by this article at future annual meetings.

(b) In addition to the penalties provided for in Section 7200, the superior court of the proper county shall enforce the duty of making and mailing or delivering the statements required by Section 6526 and, for good cause shown, may extend the time therefor.

(c) In any action or proceeding under this section, the court may award an amount to reimburse the member for reasonable expenses incurred by the member, including reasonable attorney's fees, in connection with such action or proceeding if the court determines both of the following:

(1) Prior to commencing the action or proceeding, the member made a written demand to the nonprofit corporation that it comply with the requirements of this article, specifying the specific action demanded of the nonprofit corporation.

(2) The nonprofit corporation willfully failed without justification to comply with such demand within a reasonable time.

Comment. Subdivision (a) of Section 6528 provides for judicial enforcement of the duty of making the annual report and indicates the relief that the court shall order. It should be noted that the duty of making the annual report required by this article may be dispensed with entirely by the bylaws or the bylaws may provide for an annual report that contains different or more or less information than is required by this article. See Section 6520.

Subdivision (b) is based on subdivisions (f) and (g) of Section 1501 (General Corporation Law), but the member seeking to recover reasonable expenses under subdivision (c) of Section 6528 must make a stronger showing of arbitrary corporate action than the shareholder must make under subdivision (g) of Section 1501.

405/966

§ 6529

Not Approved

§ 6529. Application of article

6529. This article applies to any domestic nonprofit corporation and also to a foreign nonprofit corporation having its principal executive office in this state or customarily holding meetings of its board in this state.

Comment. Section 6529 is the same in substance as subdivision (h) of Section 1501. The application of this article is not limited to the foreign nonprofit corporations described in Section 6529. See Section [provision comparable to Section 2115].

Note. The Commission has deferred consideration of this section until the provision comparable to Section 2115 has been considered.

968/985

§ 6610

Tentatively Approved April 1976

Renumbered April 1976

CHAPTER 16. RIGHTS OF INSPECTION

Article 1. General Provisions

§ 6610. Inspection by agent or attorney; right to copy and make extracts

6610. (a) Inspection under this chapter may be made in person or by agent or attorney.

(b) The right of inspection includes the right to copy and make extracts.

Comment. Section 6610 is the same as comparable provisions in Sections 1600, 1601, and 1602 (General Corporation Law).

968/986

§ 6611

Tentatively Approved April 1976

Renumbered April 1976

§ 6611. Records to be made available in written form

6611. If a record subject to inspection under this chapter is not maintained in written form, a request for inspection is not complied with unless and until the nonprofit corporation at its expense makes the record available in written form.

Comment. Section 6611 is the same in substance as Section 1605 (General Corporation Law).

Cross-Reference:

"Written form" requirements, §§ 8, 5195

Tentatively Approved April 1976

Article 2. Membership Records§ 6620. Authorized member defined

6620. As used in this article, "authorized member" means a member having the written authorization of at least five percent of the voting power or such lesser authorization as is specified in the bylaws.

Comment. Section 6620 adopts the five-percent requirement of Section 1600 (General Corporation Law) but permits a lesser authorization to be specified in the bylaws.

Note. This section will be reviewed in connection with the general definition of "voting power." Probably voting power should mean the power to vote for the election of directors.

Tentatively Approved April 1976

§ 6621. Adoption of bylaw providing procedure for communicating to members

6621. (a) As used in this section:

(1) "Candidate's statement" means a statement of not more than 200 words, or such greater number of words as may be provided in the bylaw, giving biographical information for and a statement of the views of the nominee or person sought to be nominated.

(2) "Nominee" means any person who has been nominated, by petition or otherwise, for election as a director.

(3) "Proxy solicitation statement" means a statement of not more than 300 words, or such greater number of words as may be provided in the bylaw, soliciting the proxies of members.

(4) "Voting members" means the members of the nonprofit corporation entitled to vote for directors.

(b) Unless the bylaws require that it be adopted by the members, the board may adopt a bylaw pursuant to this section.

(c) A bylaw adopted pursuant to this section shall, at a minimum, include all of the following:

(1) A statement that the bylaw is adopted pursuant to this section.

(2) A procedure to permit an authorized member to communicate with the voting members for the purpose of seeking support for the nomination of any person or persons for election as directors of the nonprofit corporation. The authorized member shall be permitted to communicate the name of each person so sought to be nominated, together with a candidate's statement for each such person. The number so sought to be nominated by an authorized member shall not exceed the number of positions to be filled at the next election of directors.

(3) A procedure to permit any nominee to communicate to the voting members a candidate's statement for the nominee.

(4) If proxies may be used in voting for directors, a procedure to permit an authorized member to communicate with the voting members for the purpose of soliciting proxies. The authorized member shall be permitted to communicate a proxy solicitation statement and a proxy form to be returned, at the expense of the member giving the proxy or at the expense of the authorized member, at the latter's election, by a member who desires to give a proxy to the authorized member except that, if the management of the nonprofit corporation solicits proxies and provides envelopes for returning the proxies with the postage to be paid by the

subdivision (g). This will permit a nonprofit corporation that considers its membership list to be a valuable trade secret, for example, to protect the membership list from possible improper use. The bylaw may be enforced by appropriate court orders if necessary. See Section 6651.

The bylaw may be adopted by the board unless the bylaws require that it be adopted by the members. See subdivision (b). The minimum requirements for the bylaw are stated in subdivisions (c)-(f).

Subdivision (e) requires that the statement submitted for communication to the voting members may be altered or modified to eliminate matters which would likely result in the imposition of liability on the nonprofit corporation. This will permit, for example, deletion of material which the nonprofit corporation establishes is libelous.

Subdivision (f)(2) requires that the nonprofit corporation assume all costs of printing and mailing of the communications to the voting members. The cost of mailing would include such expenses as the cost of envelopes, postage, and labor to put the material in the envelopes if the procedure provided in the bylaw results in these expenses.

Note. The staff has not yet checked the SEC proxy rules for provisions that might be adapted for use in this section.

405/799

§ 6622

Substance Tentatively Approved
April 1976

§ 6622. Right to inspect and obtain membership record

6622: (a) This section does not apply in either of the following cases:

- (1) The nonprofit corporation has adopted a bylaw which (i) satisfies the requirements of Section 6621 and (ii) includes a provision making this section not applicable to the nonprofit corporation; or

(2) A court has ordered a procedure for the nomination and election of directors, as authorized by Section 6624, and the court order includes a provision that this section shall not apply to the nonprofit corporation.

(b) As used in this section, "membership record" means the record required by subdivisions (c) and (d) of Section 6510.

(c) Every member has the right to inspect the membership record during usual business hours upon five business days' prior written demand upon the nonprofit corporation for a purpose reasonably related to such member's interests as a member. The written demand shall be under oath and shall state the purpose of the inspection. The use of the information obtained shall be limited to the purpose stated in the demand.

(d) An authorized member has the absolute right to do either or both of the following:

- (1) Inspect the membership record during usual business hours upon five business days' prior written demand upon the nonprofit corporation.
- (2) Obtain from the nonprofit corporation, upon five business days' prior written demand, a list of the members entitled to vote for directors, showing the name and address of each such member, the class of membership held by the member if there are classes of members entitled to vote for director, and the number of memberships held by the member, as of the most recent record date for which such a list has been compiled or as of a date specified by the authorized member subsequent to the date of the demand. The nonprofit corporation may require, as a condition of obtaining the membership list, that the demand be accompanied by a tender of a reasonable charge specified by the nonprofit

corporation, not in excess of the actual cost to the nonprofit corporation of furnishing the list.

(e) Upon the filing of a verified petition and after a hearing, notice of which shall be given to such persons and in such manner as the court may direct, the superior court of the proper county may, for good cause shown, make an order doing any or all of the following;

(1) Allowing the nonprofit corporation additional time to comply with subdivision (d).

(2) Postponing any previously noticed meeting of the members if the nonprofit corporation has failed to comply with a proper demand under subdivision (d) within the time limits prescribed either in subdivision (d) or in an order made pursuant to paragraph (1) of this subdivision, but any such postponement shall not exceed a period equal to the period of delay by the nonprofit corporation.

(3) Imposing just and proper conditions for the exercise of the rights granted under this section.

(f) The remedy provided by paragraph (2) of subdivision (e) is in addition to any other legal or equitable remedies to which the authorized member may be entitled.

Comment. Section 6622 does not apply to a nonprofit corporation which (1) has adopted a bylaw pursuant to Section 6621, which satisfies the requirements of that section and makes Section 6622 not applicable to the nonprofit corporation or (2) is subject to a court order prescribing the procedure for nomination and election of directors, which order includes a provision that Section 6622 does not apply to the corporation.

Subdivision (c) is the same in substance as subdivision (c) of Section 1600 (General Corporation Law) except that (1) the nonprofit corporation is given five business days to comply with the demand for

inspection, (2) the demand must be under oath and state the purpose of the inspection and (3) the use of the information obtained is limited to the purpose stated in the demand. The member is required to state in his demand a purpose reasonably related to such member's interests as a member and the burden is on the member to establish the required relationship. See Section 6650(a). An injunction would be an appropriate remedy to prevent use of the information obtained for a purpose other than the one stated in the demand.

Subdivision (d) is based on subdivision (a) of Section 1600.

Subdivision (e) permits the nonprofit corporation to seek judicial relief where the nonprofit corporation is unable to comply with subdivision (d) within the time specified in that subdivision or where the nonprofit corporation seeks to impose just and proper conditions on the exercise of the rights granted by Section 6622. Subdivision (e) also permits an authorized member to seek a postponement of a previously noticed meeting of the members where the nonprofit corporation has not timely complied with subdivision (d) or a court order made pursuant to subdivision (e). Compare Section 6650(a) (power of court to impose just and proper conditions when member seeks to enforce right of inspection). In order to obtain a postponement of a membership meeting, the authorized member must have made a "proper" demand under subdivision (d), including payment or tender of the charge specified in that subdivision. Paragraph (2) of subdivision (e) is the same in substance as a portion of subdivision (b) of Section 1600 except that the court is given discretion under subdivision (e) whether to order that the meeting be postponed.

Subdivision (f) is the same in substance as a provision of subdivision (b) of Section 1600.

992/902

§ 6623

Not Approved April 1976

§ 6623. Application of article

6623. This article applies to any domestic nonprofit corporation and to any foreign nonprofit corporation keeping its record of members or a duplicate thereof in this state or having its principal executive office in this state.

Comment. Section 6623 is the same in substance as the last sentence of subdivision (d) of Section 1600. The application of this article is not limited to foreign nonprofit corporations described in Section 6623. See Section [provision comparable to Section 2115].

Policy Issue:

Should this section be phrased like Section 6641?

Note. This section will be considered when pseudo-foreign corporations have been considered.

405/802

§ 6624

Substance Tentatively Approved
April 1976

§ 6624. Authority of court not limited

6624. (a) Nothing in this article limits the authority of the court to prescribe a different procedure that includes additional requirements, limitations, or conditions, including a lesser percentage of voting power to qualify as an authorized member for the purposes of this article, as the court determines are necessary to provide a procedure for the nomination and election of directors that is fair and equitable in view of the circumstances, practices, and nature of the particular nonprofit corporation.

(b) This article is intended to provide for a right of inspection of membership records and the solicitation of proxies in connection with the nomination and election of directors and nothing in this article limits the power of the court to permit reasonable access to membership records for other legitimate purposes.

Comment. Subdivision (a) of Section 6624 recognizes the power of the court to determine that electoral procedures for directors are unfair and unlawful and as a court of equity to require the nonprofit corporation to put into effect such electoral process as the court may consider just and proper under the circumstances of the particular case. See Braude v. Havenner, 38 Cal. App.3d 526, 113 Cal. Rptr. 386 (1974).

Subdivision (b) makes clear that this article does not limit the power of the court to permit reasonable access to membership records for other legitimate purposes.

Cross-Reference:

Court order making Section 6622 not applicable, § 6622(a)(2)

405/816

§ 6630

and information...
a...
with...

Substance Tentatively Approved
April 1976

Article 3. Financial Records and Minutes

§ 6630. Inspection of financial records and minutes

6630. (a) As used in this section:

(1) "Financial records" means the books and records referred to in subdivisions (a) and (e) of Section 6510.

(2) "Minutes" means the minutes referred to in subdivision (b) of Section 6510.

(b) The financial records and minutes of the nonprofit corporation shall be open to inspection by any member during usual business hours upon five business days' prior written demand for a purpose reasonably related to such member's interests as a member. The written demand shall be under oath and shall state the purpose of the inspection.

Comment. Section 6630 is based on subdivision (a) of Section 1601 (General Corporation Law). The requirement that the demand be under oath and state the purpose of the inspection is taken from Pennsylvania nonprofit corporation law. See Pa. Stat. Ann. tit. 15, § 7508(b)(1972). The requirement that the nonprofit corporation be given five business days to comply with the demand is not found in the comparable provision of the General Corporation Law, but it is included here to permit the nonprofit corporation time to determine whether the demand is for a proper purpose and to schedule the inspection so that there will be a minimum disruption of its office personnel.

Under Section 6630, any member may inspect the financial records and minutes only for a purpose reasonably related to such member's interests as a member. Under Section 6526, a member authorized in writing by members holding not less than five percent of the voting power may obtain a financial statement without the necessity of showing the purpose of obtaining the financial statement.

Note. The staff has not yet collected the cases construing the requirement that the purpose be "reasonably related to such member's interests as a member." The Comment will be revised to include the results of this research.

405/842 § 6631

Not Approved April 1976

§ 6631. Application of article

6631. This article applies to a domestic nonprofit corporation, to a foreign nonprofit corporation having its principal executive office in this state, and to any other foreign nonprofit corporation with respect to books or records actually or customarily located in this state.

Comment. Section 6631 is based on a portion of subdivision (a) of Section 1601 (General Corporation Law). The application of this article is not limited to foreign nonprofit corporations described in Section 6631. See Section [provision comparable to Section 2115].

Policy Issue:

Should this section be phrased like Section 6641?

Note. This section will be considered when the provisions relating to pseudo-foreign corporations have been considered.

405/843

§ 6640

Tentatively Approved April 1976

Article 4. Director's Rights of Inspection

§ 6640. Director's right to inspect and copy

6640. Every director of a nonprofit corporation has the absolute right at any reasonable time to inspect all books, records, and documents of every kind and to inspect the physical properties of the nonprofit corporation.

Comment. Section 6640 is the same in substance as the first sentence of Section 1602 (General Corporation Law). The right to inspect includes the right to copy. See Section 6610.

405/924

§ 6641

Not Approved April 1976

§ 6641. Application of article

6641. This article applies to all of the following:

- (a) A domestic nonprofit corporation.
- (b) A foreign nonprofit corporation having its principal executive office in this state.
- (c) A foreign nonprofit corporation subject to Section [provision comparable to Section 2115].
- (d) Any other foreign nonprofit corporation with respect to such books, records, documents, and properties as are actually or customarily located in this state.

Comment. Section 6641 is similar to the second sentence of Section 1602 (General Corporation Law) except that Section 6641 gives the director a broader right of inspection with respect to foreign nonprofit corporations than Section 1602. Unlike Section 1602, in the case of a foreign corporation described in subdivision (b) or (c) of Section 6041, the director may inspect books, records, documents, and properties wherever they may be located. Compare Section 1602.

Note. This section will be considered after the provisions relating to pseudo-foreign corporations have been considered.

Substance Tentatively Approved
 April 1976

Article 5. Judicial Enforcement

§ 6650. Enforcement of right of inspection; appointment of inspectors or accountants

6650. (a) Upon refusal of, or noncompliance with, a proper demand for inspection, the superior court of the proper county or of the county in which any of the books, records, documents, or property is located may enforce the right of inspection provided in this chapter with just and proper conditions. When inspection is sought by a member pursuant to subdivision (c) of Section 6622 or Section 6630, the member has the burden of establishing that the inspection is for a proper purpose.

(b) The court may, for good cause shown, appoint one or more competent inspectors or accountants to audit the books and records and to investigate the property, funds, and affairs of the nonprofit corporation if such books, records, property, funds, and affairs are subject to inspection under this chapter. The court may direct such inspectors or accountants to report thereon in such manner as the court may direct.

(c) All officers and agents of the nonprofit corporation shall produce to the inspectors or accountants so appointed all books and documents subject to inspection which are in their custody or under their control under penalty of punishment for contempt of court for willful noncompliance.

(d) All expenses of the investigation or audit shall be defrayed by the applicant unless the court orders them to be paid or shared by the nonprofit corporation.

Comment. Section 6650 is based on Section 1603 (General Corporation Law). Section 6650 expands the venue of Section 1603 to include the county where "any of the" documents sought are located whether the nonprofit corporation is domestic or foreign. When inspection is sought by a member, the member has the burden of establishing the right to such inspection.

Under subdivision (b), the court's power to appoint inspectors or accountants is in addition to its other powers.

Subdivisions (c) and (d) are the same in substance as subdivisions (b) and (c), respectively, of Section 1603.

Note. The staff has not yet researched the case law concerning the burden of establishing "proper purpose," but any relevant cases will be referred to in the Comment. The staff has not yet considered the effect, if any, subdivision (c) might have on the attorney-client privilege or other privileges.

406/230

§ 6651

Substance Tentatively Approved
April 1976

§ 6651. Enforcement of bylaw providing procedure for communicating to members

6651. Subject to Section 6624, the superior court of the proper county shall, by appropriate orders, enforce the provisions of any bylaw adopted pursuant to Section 6621.

Comment. Section 6651, which is new, is designed to provide a clear means of enforcing the provisions of a bylaw adopted pursuant to Section 6621.

Tentatively Approved April 1976

Renumbered April 1976

§ 6652. Recovery of reasonable expenses by member or director

6652. In any action or proceeding under this chapter, if the court finds the failure of the nonprofit corporation to comply with a proper demand thereunder was arbitrary and completely without justification, the court may award an amount sufficient to reimburse the member or director for the reasonable expenses, including reasonable attorney's fees, incurred in connection with such action or proceeding.

Comment. Section 6652 is based on Section 1604 (General Corporation Law). Section 6652 requires that the noncompliance by the nonprofit corporation be "arbitrary" and "completely" without justification but extends the right to recover reasonable expenses to directors who seek to enforce rights of inspection pursuant to Section 6640.

CHAPTER 13. INVOLUNTARY DISSOLUTION

Article 1. Proceedings by Directors or Members

§ 6810. Persons who may commence proceedings

§ 6811. Grounds for proceedings

Article 2. Proceedings by State

§ 6820. Grounds for proceedings

§ 6821. Notice to nonprofit corporation

§ 6822. Service of process; publication of notice

Article 3. General Provisions Concerning
Involuntary Dissolution

§ 6830. When proceedings for winding up commence

§ 6831. Filing of copy of decree of dissolution

Tentatively Approved
April 1976

Renumbered April 1976

CHAPTER 18. INVOLUNTARY DISSOLUTION

Article 1. Proceedings by Directors or Members

§ 6810. Persons who may commence proceedings

6810. (a) A verified complaint for involuntary dissolution of a nonprofit corporation on any one or more of the grounds specified in Section 6811 may be filed in the superior court of the proper county by any of the following persons:

- (1) One-half or more of the directors in office.
- (2) Members holding one-third or more of the voting power.
- (3) Any member if the ground for dissolution is that the period for which the nonprofit corporation was formed has expired without extension thereof, or that the charter of a subordinate body incorporated pursuant to the General Nonprofit Corporation Law has been surrendered to, taken away, or revoked by the head or national body granting it.

- (4) Any other person expressly authorized to do so in the articles.

(b) At any time prior to the trial of the action, any member or creditor may intervene therein.

Comment. Section 6810 is the same in substance as subdivisions (a) and (c) of Section 1800 (General Corporation Law) except that the close corporation concept is not incorporated into Section 6810 and the provision authorizing any member to bring a proceeding for involuntary dissolution when the charter of a "subordinate body" has been revoked is new. See also Corp. Code § 5214(d).

The term "proper county" is defined in Section 5177. The term "directors" includes persons who act in the capacity of directors regardless of the title given to such persons. See Corp. Code § [9300(e) of old law].

Tentatively Approved
April 1976

Renumbered April 1976

§ 6811. Grounds for proceedings

6811. The grounds for involuntary dissolution in a proceeding commenced by a person authorized to do so in Section 6810 are that:

(a) The nonprofit corporation has abandoned its activities for more than one year.

(b) The nonprofit corporation has an even number of directors who are equally divided and cannot agree as to the management of its affairs so that its activities can no longer be conducted to advantage or so that there is danger that its property and activities will be impaired and the voting members are so divided into factions that they cannot elect a board consisting of an uneven number.

(c) There is internal dissension and two or more factions of members of the nonprofit corporation are so deadlocked that its activities can no longer be advantageously conducted.

(d) The members have failed in an election in which all voting power was exercised at two consecutive annual meetings to elect successors to directors whose terms have expired or would have expired upon election of their successors.

(e) Those in control of the nonprofit corporation have been guilty of or have knowingly countenanced persistent and pervasive fraud, mismanagement, abuse of authority, or persistent unfairness toward any members, or its property is being misapplied or wasted by its directors or officers.

(f) The period for which the nonprofit corporation was formed has expired without extension of such period.

(g) The nonprofit corporation is a subordinate body whose charter has been surrendered to, taken away, or revoked by the head or national body granting it.

Comment. Subdivisions (a) through (f) of Section 6811 are the same in substance as subdivision (b) of Section 1800 (General Corporation Law). Subdivision (g) is derived from former Section 9802 and authorizes involuntary dissolution proceedings when the charter of a "subordinate body" has been revoked. See also Corp. Code § 5214(d).

Tentatively Approved

April, 1976

Renumbered April 1976

Article 2. Proceedings by State

§ 6820. Grounds for proceedings

6820. The Attorney General may bring an action against any domestic nonprofit corporation or purported domestic nonprofit corporation in the name of the people of this state, upon the Attorney General's own information or upon complaint of a private party, to procure a judgment dissolving the nonprofit corporation and annulling, vacating, or forfeiting its corporate existence upon any of the following grounds:

(a) The nonprofit corporation has seriously offended against any provision of the statutes regulating such corporations.

(b) The nonprofit corporation has fraudulently abused or usurped corporate privileges or powers.

(c) The nonprofit corporation has violated any provision of law by any act or default which under the law is a ground for forfeiture of corporate existence.

(d) The nonprofit corporation has failed to pay to the Franchise Tax Board for a period of five years any tax imposed upon it by the Bank and Corporation Tax Law.

(e) The nonprofit corporation was formed for a limited period and its term of existence has expired without extension of such period.

(f) The nonprofit corporation is a subordinate body whose charter has been surrendered to, taken away, or revoked by the head or national body granting it.

Comment. Subdivisions (a) through (d) of Section 6820 are the same in substance as subdivision (b) of Section 1801 (General Corporation Law).

Subdivision (d) will not apply to nonprofit corporations which have timely obtained a tax exemption pursuant to Section 23701 of the Revenue and Taxation Code.

Subdivision (e) is new and allows the Attorney General to commence proceedings to wind up a nonprofit corporation whose term of existence has expired without extension. See also Corp. Code § 5912 (extension of corporate existence).

Subdivision (f) is derived from former Section 9802 and authorizes the Attorney General to commence involuntary dissolution proceedings against a "subordinate body" whose charter has been revoked. See also Corp. Code § 5214(d).

999/330

§ 6821

Tentatively Approved
April 1976

Renumbered April 1976

§ 6821. Notice to nonprofit corporation

6821. If the ground of the action is a matter or act which the nonprofit corporation has done or omitted to do that can be corrected by amendment of its articles or by other corporate action, such suit shall not be maintained unless (1) the Attorney General, at least 30 days prior to the institution of suit, has given the nonprofit corporation written notice of the matter or act done or omitted to be done and (2) the nonprofit corporation has failed to take steps to correct it within the 30-day period or thereafter fails to pursue corrective action.

Comment. Section 6821 is the same in substance as subdivision (b) of Section 1801 (General Corporation Law).

Tentatively Approved
April 1976

Renumbered April 1976

§ 6822. Service of process; publication of notice

6822. In addition to serving process on the nonprofit corporation as provided in Chapter 4 of Division 4, the Attorney General shall publish one time in a newspaper of general circulation in the proper county a notice to the members of the nonprofit corporation.

Comment. Section 6822 is similar to subdivision (d) of Section 1801 (General Corporation Law). Section 6822 does not authorize service by written notice to the president or secretary of the corporation at the address indicated in the corporation's last tax return as is authorized by Section 1801(d).

999/333

§ 6830

Tentatively Approved

April 1976

Renumbered April 1976

Article 3. General Provisions Concerning

Involuntary Dissolution

§ 6830. When proceedings for winding up commence

6830. Involuntary proceedings for winding up a nonprofit corporation commence when the order for winding up is entered under subdivision (d) of Section 7010.

Comment. Section 6830 is the same in substance as subdivision (a) of Section 1805 (General Corporation Law).

999/347

§ 6831

Tentatively Approved

May 1976

Renumbered May 1976

§ 6831. Filing of copy of decree of dissolution

6831. (a) Whenever a nonprofit corporation is dissolved or its existence forfeited by order, decree, or judgment of a court, a copy of the order, decree, or judgment, certified by the clerk of court, shall forthwith be filed in the office of the Secretary of State.

(b) Notwithstanding Section 23334 of the Revenue and Taxation Code, when the order is based on an action for involuntary dissolution brought by the Attorney General pursuant to Section 6820, there need not be

filed in the office of the Secretary of State the certificate of satisfaction of the Franchise Tax Board that all taxes have been paid or secured.

Comment. Section 6831 is the same in substance as Section 1809 (General Corporation Law).

CHAPTER 19. VOLUNTARY DISSOLUTION

Article 1. Election to Dissolve; Revocation

- § 6910. Voluntary dissolution by members
- § 6911. Voluntary dissolution by board
- § 6912. Certificate of election to wind up and dissolve
- § 6913. Revocation of election to wind up and dissolve

Article 2. General Provisions Concerning Voluntary Dissolution

- § 6920. When proceedings for winding up commence
- § 6921. Supervision by court upon petition
- § 6922. Certificate of dissolution
- § 6923. Petition to court in lieu of filing certificate of dissolution

Tentatively Approved
May 1976

Renumbered May 1976

CHAPTER 19. VOLUNTARY DISSOLUTION

Article 1. Election to Dissolve, Revocation

§ 6910. Voluntary dissolution by members

6910. Any nonprofit corporation may elect voluntarily to wind up and dissolve by the vote of members holding 50 percent or more of the voting power or such greater percent of the voting power as the bylaws may provide.

Comment. Section 6910 is the same in substance as subdivision (a) of Section 1900 (General Corporation Law) except that Section 6910 allows the articles or bylaws to require an extraordinary majority for voluntary dissolution. See Corp. Code § 5155.5 ("bylaws" includes articles).

Note. The language "or such greater percent of the voting power as the bylaws may provide" should be reviewed after the general provision comparable to Section 204(a)(5) (proportion of vote required for corporate actions) is drafted.

Subdivisions (a)-(c) Tentatively Approved May 1976

Subdivisions (d) & (e) Not Approved

Renumbered May 1976

§ 6911. Voluntary dissolution by board

6911. Any nonprofit corporation which comes within one of the following descriptions may elect by approval by the board to wind up and dissolve:

- (a) A nonprofit corporation which has been adjudicated a bankrupt.
- (b) A nonprofit corporation which has disposed of all of its assets and has not conducted any activities for a period of five years immediately preceding the adoption of the resolution electing to dissolve the nonprofit corporation.
- (c) A nonprofit corporation which has no members other than the directors.
- (d) A nonprofit corporation formed for a limited period and whose term of existence has expired without extension of such period.
- (e) The nonprofit corporation is a subordinate body whose charter has been surrendered to, taken away, or revoked by the head or national body granting it.

Comment. Subdivisions (a)-(c) of Section 6911 are the same in substance as paragraphs (1)-(3) of subdivision (b) of Section 1900 (General Corporation Law) except that subdivision (c) takes account of the rule that, when a nonprofit corporation has no members, the directors are treated as the members. See Corp. Code § 5402. Subdivision (d) is new and parallels subdivision (f) of Section 6811. See also Corp. Code § 5912 (extension of corporate existence).

Subdivision (e) is derived from former Section 9802 and authorizes voluntary dissolution proceedings when the charter of a "subordinate body" has been revoked. See also Corp. Code § 5214(d).

406/001

§ 6912

Tentatively Approved
May 1976

Renumbered May 1976

§ 5912. Certificate of election to wind up and dissolve

6912. (a) Whenever a nonprofit corporation has elected to wind up and dissolve, a certificate evidencing such election shall forthwith be filed.

(b) The certificate shall be an officers' certificate or shall be signed and verified by at least a majority of the directors then in office or by one or more members authorized to do so by members holding 50 percent or more of the voting power and shall set forth:

(1) That the nonprofit corporation has elected to wind up and dissolve.

(2) If the election was made by the vote of members, the number of members voting for the election and that the election was made by members holding at least 50 percent of the voting power or such greater percent of the voting power as the bylaws provide.

(3) If the certificate is executed by a member or members, that the subscribing member or members were authorized to execute the certificate by members holding at least 50 percent of the voting power.

(4) If the election was made by the board pursuant to Section 6911, the certificate shall also set forth the circumstances showing the non-profit corporation to be within one of the categories described in said section.

Comment. Section 6912 is the same in substance as Section 1901 (General Corporation Law) except that paragraph (2) of subdivision (b) recognizes that the articles or bylaws may require an extraordinary majority for voluntary dissolution. See Corp. Code § 6910. The requirement of subdivision (a) that the certificate be "filed" means filed in the office of the Secretary of State. Corp. Code § 5169.

404/967

§ 6913

Tentatively Approved
May 1976

Renumbered May 1976

§ 6913. Revocation of election to wind up and dissolve

6913. (a) A voluntary election to wind up and dissolve may be revoked prior to distribution to any assets by the vote of the members holding a majority of the voting power, or by approval by the board if the election was by the board pursuant to Section 6911. Thereupon a certificate evidencing the revocation shall be signed, verified and filed in the manner prescribed by Section 6912.

(b) The certificate shall set forth:

(1) That the nonprofit corporation has revoked its election to wind up and dissolve.

(2) That no assets have been distributed pursuant to the election.

(3) If the revocation was made by the vote of members, the number of votes cast in favor of the revocation and the total number of votes entitled to be cast by the membership.

(4) If the election and revocation were by the board, that shall be stated.

Comment. Section 6913 is the same in substance as Section 1902 (General Corporation Law).

404/968

§ 6920

Tentatively Approved
May 1976

Renumbered May 1976

Article 2. General Provisions Concerning Voluntary Dissolution

§ 6920. When proceedings for winding up commence

6920. Voluntary proceedings for winding up the nonprofit corporation commence upon the adoption of the resolution of members or the board of the nonprofit corporation electing to wind up and dissolve, or upon the filing with the nonprofit corporation of a written consent of members thereto.

Comment. Section 6920 is the same in substance as subdivision (a) of Section 1903 (General Corporation Law).

404/972

§ 6921

Tentatively Approved
May 1976

Renumbered May 1976

§ 6921. Supervision by court upon petition

6921. If a nonprofit corporation is in the process of voluntary winding up, the superior court of the proper county, upon the petition of (1) the nonprofit corporation or (2) members holding five percent or more of the voting power, or (3) three or more creditors, and upon such notice to the nonprofit corporation and to other persons interested in the nonprofit corporation as members and creditors as the court may

order, may take jurisdiction over such voluntary winding up proceeding if that appears necessary for the protection of any parties in interest.

Comment. Section 6921 is the same in substance as the first sentence of Section 1904 (General Corporation Law) except that no reference is made in Section 6921 to a close corporation since that concept is not carried over into General Nonprofit Corporation Law. The term "proper county" is defined in Section 5177.

999/544

§ 6922

Tentatively Approved

May 1976

Renumbered May 1976

§ 6922. Certificate of dissolution

6922. (a) When a nonprofit corporation has been completely wound up without court proceedings therefor, a majority of the directors then in office shall sign and verify a certificate of dissolution stating:

- (1) That the nonprofit corporation has been completely wound up.
- (2) That its known debts and liabilities have been actually paid, or adequately provided for, or paid or adequately provided for as far as its assets permitted, or that it has incurred no known debts or liabilities, as the case may be. If there are known debts or liabilities for payment of which adequate provision has been made, the certificate shall state what provision has been made, setting forth the name and address of the corporation, person or governmental agency that has assumed or guaranteed the payment, or the name and address of the depository with

which deposit has been made or such other information as may be necessary to enable the creditor or other person to whom payment is to be made to appear and claim payment of the debt or liability.

(3) That its known assets have been distributed to members or if there are no members to the persons entitled thereto, disposed of in conformity with the purposes of any charitable trust or the charitable purposes for which the nonprofit corporation was organized, wholly applied or deposited on account of its debts and liabilities, or that it acquired no known assets, as the case may be.

(4) That the nonprofit corporation is dissolved.

(b) The certificate of dissolution shall be filed. However, before any nonprofit corporation taxed under the Bank and Corporation Tax Law may file a certificate of dissolution it shall file or cause to be filed the certificate of satisfaction of the Franchise Tax Board that all taxes imposed under the Bank and Corporation Tax Law have been paid or secured or that no such taxes have been imposed.

Comment. Section 6922 is the same in substance as Section 1905 (General Corporation Law) except that paragraph (3) of subdivision (a) recognizes the rules concerning disposition of property subject to charitable trust. See Corp. Code § 7053. Upon filing the certificate of dissolution, the corporate existence ceases. Corp. Code § 7061(a).

The board may, in lieu of filing the certificate of dissolution required by this section, petition the superior court of the proper county for an order declaring the corporation duly wound up and dissolved. Corp. Code § 6923(e).

Tentatively Approved
May 1976

Renumbered May 1976

§ 6923. Petition to court in lieu of filing certificate of dissolution

6923. (a) The board, in lieu of filing the certificate of dissolution, may petition the superior court of the proper county for an order declaring the nonprofit corporation duly wound up and dissolved. Such petition shall be filed in the name of the nonprofit corporation.

(b) Upon the filing of the petition, the court shall make an order requiring all persons interested to show cause why an order should not be made declaring the nonprofit corporation duly wound up and dissolved and shall direct that the order be served by notice to all creditors, claimants, and members in the same manner as the notice given under Section 7032.

(c) Any person claiming to be interested as member, creditor or otherwise may appear in the proceeding at any time before the expiration of 30 days from service of the order as provided in subdivision (b) to show cause and contest the petition, and upon failure to appear such person's claims shall be barred.

(d) Thereafter a copy of the order, certified by the clerk of court, shall be filed in the office of the Secretary of State.

Comment. Section 6923 is the same in substance as Section 1907 (General Corporation Law) except that the notice given under Section 7032 is by mail unless the court provides for notice other than by mail. Compare Corp. Code § 1807(b)(notice by publication).

CHAPTER 20. GENERAL PROVISIONS RELATING TO DISSOLUTION

Article 1. Powers of the Court

§ 7010. Powers of the court in proceeding for winding up

Article 2. Avoidance of Dissolution by Purchase; Procedures

§ 7020. Application of article

§ 7021. Avoidance of dissolution by purchase

§ 7022. Stay of court proceedings and valuation of memberships

§ 7023. Appraisal of memberships

§ 7024. Alternative decree; appeal

§ 7025. Time for payment; transfer of memberships

Article 3. Corporate Activities During Winding Up

§ 7030. Cessation of corporate activities; exceptions

§ 7031. Powers of the board and officers during winding up

§ 7032. Notice of winding up

§ 7033. Filling a vacancy on board of directors

§ 7034. Petition to determine or appoint directors

Article 4. Presentation of Claims

§ 7040. Time to present claims; notice to creditors and claimants

§ 7041. Holders of secured claims

§ 7042. Unmatured, contingent, or disputed claims

§ 7043. Time to commence suits on rejected claims

Article 5. Distribution of Assets

§ 7050. Distribution after payment of debts

§ 7051. Adequate provision for payment of debts and liabilities

§ 7052. Return of assets held on condition

§ 7053. Disposition of assets held on trust or by charitable corporation

§ 7054. Distribution among members or in accordance with bylaws

§ 7055. Manner of distribution

§ 7056. Plan of distribution of securities or assets in kind

§ 7057. Deposit of distribution to creditors, members, and other persons

§ 7058. Recovery of improper distribution to members

Article 6. Cessation of Corporate Existence

- \$ 7060. Order declaring nonprofit corporation duly wound up and dissolved
- \$ 7061. Cessation of corporate existence; continued existence for some purposes
- \$ 7062. Suits against dissolved nonprofit corporation

Article 7. Conditions for Dissolution of Regulated Nonprofit Corporations

- \$ 7070. Conditions for dissolution of regulated nonprofit corporations

Substance Tentatively Approved May 1976

CHAPTER 20. GENERAL PROVISIONS RELATING TO DISSOLUTION

Article 1. Powers of the Court

§ 7010. Powers of the court in proceeding for winding up

7010. When a complaint for involuntary dissolution has been filed, or when the court assumes jurisdiction over a voluntary winding up proceeding pursuant to Section 6921, the court may:

(a) Appoint a receiver in the manner provided in Chapter 5 (commencing with Section 564) of Title 7 of Part 2 of the Code of Civil Procedure to take over and manage the affairs of the nonprofit corporation and to preserve its property either before or after the hearing and termination of the complaint for dissolution, or to conduct the winding up, if the court has reasonable grounds to believe that unless a receiver is appointed the interests of the nonprofit corporation and its members will suffer.

(b) Appoint a commissioner to hear and determine any or all matters with such power or authority as the court deems proper.

(c) Order the bringing in of new parties as the court deems proper for the determination of all questions and matters.

(d) After a hearing, order that the nonprofit corporation shall be wound up and dissolved if cause therefor is shown or order such other or partial relief as the court deems proper.

(e) Appoint persons other than the directors, on good cause shown, to conduct the winding up or order that the nonprofit corporation be wound up by its board subject to the supervision of the court.

(f) Appoint a provisional director if the proceeding is for involuntary dissolution and the ground for the complaint is that there is a deadlock in the board as set forth in subdivision (b) of Section 6821.

(g) Fill any vacancies on the board which the directors or members are unable to fill.

(h) Remove any director if the director is unable to act or has been guilty of dishonesty, misconduct, neglect, or abuse of trust in conducting the winding up.

(i) Enjoin for such time as it considers proper the reelection of a director who has been removed.

(j) Order an election to fill the vacancy caused by removal of a director.

(k) Appoint a director in lieu of ordering an election to fill the vacancy caused by removal of a director, which appointed director shall serve until the next annual meeting of members or until a successor is elected or appointed.

(l) Require proof of all claims and demands against the nonprofit corporation, whether due or not yet due, contingent, unliquidated, or sounding only in damages, and bar from participation of creditors and claimants failing to make and present claims and proof as required by any order.

(m) Determine or compromise all claims of every nature against the nonprofit corporation or any of its property and determine the amount of money or assets required to be retained to pay or provide for the payment of claims.

(n) Stay the prosecution of any action or proceeding against the nonprofit corporation and require the parties to present and prove their claims in the manner required of other creditors.

(o) Determine whether adequate provision has been made for payment or satisfaction of all debts and liabilities not actually paid.

(p) Determine the rights of members and of all classes of members in and to the assets of the nonprofit corporation.

(q) Receive, file, hold hearings on, and allow, disallow, or settle intermediate or final accounts of the directors or other persons appointed to conduct the winding up.

(r) Discharge the directors or other persons appointed to conduct the winding up from their duties and liabilities.

(s) Order the withdrawal or termination of involuntary proceedings to wind up and dissolve, subject to such conditions for the protection of members and creditors as the court deems proper.

(t) Order, upon the allowance or settlement of the final accounts of the directors or other persons appointed to conduct the winding up and upon the determination that the affairs of the nonprofit corporation are in condition for it to be dissolved, that the nonprofit corporation has been duly wound up and is dissolved as provided in Section 7060.

(u) Make such other orders and grant such further relief as the court deems proper.

Comment. As in General Corporation Law, Section 7010 applies both to involuntary dissolution proceedings (see Corp. Code § 1806) and to voluntary proceedings where the court has assumed jurisdiction (see Corp. Code § 1904). Subdivision (a) of Section 7010 is similar in substance to Section 1803 (General Corporation Law) and the second sentence of subdivision (c) of Section 1801. Subdivision (a) of Section 7010 recognizes the "inherent" power of a court of equity to appoint a receiver with notice, or without notice if "imperative necessity" is shown, either to wind up the affairs of the corporation or "to preserve its properties, and, where possible, continue its corporate functions."

See Misita v. Distillers Corp., Ltd., 54 Cal. App.2d 244, 250-252, 128 P.2d 888, (1942). If a receiver is appointed ex parte, the court must require the applicant to furnish an undertaking as prescribed in Section 566 of the Code of Civil Procedure. Before entering upon his duties, the receiver must furnish an undertaking as prescribed in Section 567 of the Code of Civil Procedure.

Subdivision (d) is the same in substance as a portion of Section 1804 and the first sentence of subdivision (c) of Section 1801 but authorizes "other or partial relief" in all cases, not merely those brought by the Attorney General. An order made pursuant to subdivision (d) that the nonprofit corporation shall be wound up and dissolved is appealable. See Reynolds v. Special Projects, Inc., 260 Cal. App.2d 496, 499-501, 67 Cal. Rptr. 374, (1968).

Subdivision (e) is the same in substance as the first sentence of subdivision (b) of Section 1805.

Subdivision (f) is the same in substance as the first sentence of Section 1802. If the court appoints a provisional director pursuant to subdivision (f), such director is subject to Section 5343 (qualifications of provisional director), 5344 (rights and powers of provisional director), and 5345 (compensation of provisional director).

Subdivision (u) is the same in substance as a portion of Section 1804.

Subdivisions (h), (c), and (g) through (t) are the same in substance as Section 1806.

405/971

§ 7020

Tentatively Approved
May 1976

Renumbered May 1976

Article 2. Avoidance of Dissolution by Purchase; Procedures

§ 7020. Application of article

7020. The provisions of this article do not apply to a nonprofit corporation which is organized for charitable purposes.

Comment. Section 7020 is new and provides that the statutory buy-out procedure of this article does not apply to a charitable nonprofit corporation.

405/972

§ 7021

Substance Tentatively Approved
May 1976

Renumbered May 1976

§ 7021. Avoidance of dissolution by purchase

7021. (a) Subject to any contrary provision in the bylaws, in any proceeding for voluntary or involuntary dissolution initiated by the vote of members representing a majority of the voting power, the nonprofit corporation or, if it does not elect to purchase, any member or members (the "purchasing parties") may avoid the dissolution of the nonprofit corporation and the appointment of any receiver by purchasing for cash the memberships owned by the members initiating the proceeding (the "moving parties") and by the members described in subdivision (d) at their fair value.

(b) The fair value shall be determined on the basis of the liquidation value but taking into account the possibility, if any, of sale of any business conducted by the nonprofit corporation as a going concern in a liquidation. In fixing the value, the amount of any damages resulting if the initiation of the dissolution is a breach by any moving party or parties of an agreement with the purchasing party or parties may be deducted from the amount payable to such moving party or parties, unless the ground for dissolution is that specified in subdivision (e) of Section 6811.

(c) The election of the nonprofit corporation to purchase may be made by the approval of members holding a majority of the voting power excluding the voting power of the moving parties.

(d) If the nonprofit corporation elects to purchase, the members who did not approve the purchase may elect to have their memberships purchased by the nonprofit corporation at their fair value in the same manner as the memberships owned by the moving parties.

Comment. Section 7021 is the same in substance as subdivision (a) of Section 2000 (General Corporation Law).

Note. The staff has not yet considered how the rights of creditors may best be protected when corporate assets are used for the purchase of memberships.

405/973

§ 7022

Tentatively Approved
May 1976

Renumbered May 1976

§ 7022. Stay of court proceedings and valuation of memberships

7022. (a) If the purchasing parties elect to purchase the member-

ships of the moving parties, are unable to agree with the moving parties upon the fair value of such memberships, and give bond in a sufficient amount to pay the recoverable expenses (including reasonable attorney's fees) of the moving parties, the court upon application of the purchasing parties shall stay the winding up and dissolution proceeding and shall proceed to ascertain and fix the fair value of the memberships of the moving parties.

(b) The purchasing parties may make the application referred to in subdivision (a) either in the pending proceeding or, in the case of a voluntary dissolution proceeding over which the court has not taken jurisdiction, in a proceeding initiated in the superior court of the proper county.

Comment. Section 7022 is the same in substance as subdivision (b) of Section 2000 (General Corporation Law). The term "proper county" is defined in Section 5177.

405/974

§ 7023

Tentatively Approved

May 1976

Renumbered May 1976

§ 7023. Appraisal of memberships.

7023. (a) The court shall appoint three disinterested appraisers to appraise the fair value of the memberships of the moving parties, and shall make an order referring the matter to the appraisers so appointed for the purpose of ascertaining such value.

(b) The order shall prescribe the time and manner of producing evidence, if evidence is required.

(c) The award of the appraisers or of a majority of them, when confirmed by the court, shall be final and conclusive upon all parties.

(d) The purchasing parties shall pay the appraiser's fees and other costs of the appraisal, if any, unless the court for good cause orders otherwise.

Comment. Section 7023 is the same in substance as the first three sentences of subdivision (c) of Section 2000 (General Corporation Law).

405/975

§ 7024

Tentatively Approved

May 1976

Renumbered May 1976

§ 7024. Alternative decree; appeal

7024. (a) The court shall enter a decree which shall provide in the alternative for winding up and dissolution of the nonprofit corporation unless payment is made for the memberships within the time specified in the decree.

(b) If the purchasing parties do not make payment for the memberships within the time specified, judgment shall be entered against them and the surety or sureties on the bond for the amount of the expenses (including reasonable attorney's fees) of the moving parties. The court shall have jurisdiction to render such a judgment whether or not the pending proceeding is dismissed.

(c) Any member aggrieved by the action of the court may appeal therefrom.

Comment. Section 7024 is the same in substance as the last three sentences of subdivision (c) of Section 2000 (General Corporation Law) except that the last sentence of subdivision (b) is new. See also Code Civ. Proc. § 1032(b).

405/976

§ 7025

Tentatively Approved
May 1976

Renumbered May 1976

§ 7025. Time for payment; transfer of memberships

7025. (a) If the purchasing parties desire to prevent the winding up and dissolution, they shall pay to the moving parties the value of their memberships ascertained and decreed within the time specified pursuant to Section 7024, or, in case of an appeal, as fixed on appeal.

(b) On receiving such payment or the tender thereof, the moving parties shall transfer their memberships to the purchasing parties.

Comment. Section 7025 is the same in substance as subdivision (d) of Section 2000 (General Corporation Law).

Substance Tentatively Approved May 1976

Renumbered May 1976

Article 3. Corporate Activities During Winding Up

§ 7030. Cessation of corporate activities; exceptions

7030. The nonprofit corporation shall cease to carry on its activities except to the extent necessary for the beneficial winding up thereof and except during such period as the board may deem necessary to preserve the nonprofit corporation's goodwill or going concern value pending a sale of any business conducted by it, of its assets, or both, in whole or in part, under either of the following conditions:

(a) When a proceeding for winding up has commenced.

(b) Except as otherwise provided by law, if the term of existence for which the nonprofit corporation was organized expires without renewal or extension thereof.

Comment. Section 7030 is the same in substance as the first sentence of subdivision (c) of Section 1805 (General Corporation Law), the first sentence of subdivision (c) of Section 1903, and a portion of Section 1906 except that Section 7030 expressly authorizes preservation of going concern value after expiration of the corporate term of existence.

In cases where subdivision (a) applies, involuntary proceedings for winding up commence when the order that the nonprofit corporation shall be wound up and dissolved is entered (Corp. Code § 6830), and voluntary proceedings for winding up commence upon the adoption of the resolution to dissolve or the filing of members' consent thereto (Corp. Code § 6920).

In cases where subdivision (b) applies, the expired term of corporate existence may be extended under certain circumstances. See Corp. Code § 5912. If the corporate term is not extended, the nonprofit corporation may be wound up voluntarily (see Corp. Code § 6911) or involuntarily (see Corp. Code §§ 6811, 6820).

Tentatively Approved
May 1976

Renumbered May 1976

§ 7031. Powers of the board and officers during winding up

7031. (a) When proceedings for winding up have commenced, the board shall continue to act as a board and shall conduct the winding up of the affairs of the nonprofit corporation unless other persons are appointed by the court to conduct the winding up pursuant to subdivision (e) of Section 7010. The board shall be subject to the supervision of the court in an involuntary dissolution proceeding or in a voluntary dissolution proceeding when the court has assumed jurisdiction pursuant to Section 6921.

(b) The board or such other persons may, subject to any restrictions imposed by the court, exercise all their powers through the executive officers without any order of court.

(c) The board or such other persons shall have full power to wind up and settle the affairs of the nonprofit corporation, both before and after the filing of the certificate or decree of dissolution. Such powers include, but are not limited to, the following acts in the name of and on behalf of the nonprofit corporation:

(1) Choosing officers and employing agents and attorneys to liquidate or wind up its affairs.

(2) Conducting the activities of the nonprofit corporation insofar as necessary for the disposal or winding up thereof.

(3) Making and carrying out contracts, and collecting, paying, compromising, and settling debts and claims for or against the nonprofit corporation.

(4) Defending suits brought against the nonprofit corporation.

(5) Suing in the name of the nonprofit corporation for all sums due or owing to the nonprofit corporation or to recover any of its property.

(6) Collecting any amounts remaining unpaid on membership fees, dues, or assessments, and recovering unlawful distributions.

(7) Selling at public or private sale, exchanging, conveying, or otherwise disposing of all or any part of the assets of the corporation for cash in an amount deemed reasonable by the board without compliance with the provisions of Section 6001, or (subject to compliance with the provisions of Section 6001), upon such other terms and conditions and for such other consideration as the board deems reasonable or expedient, and executing bills of sale and deeds of conveyance in the name of the corporation.

(8) In general, doing any and all things in the name of the nonprofit corporation which may be proper or convenient for the purpose of winding up, settling, and liquidating the affairs of the nonprofit corporation.

Comment. Subdivision (a) of Section 7031 is the same in substance as a portion of subdivision (b) of Section 1903 and the first sentence of subdivision (b) of Section 1805. Proceedings for winding up commence upon the adoption of the resolution for voluntary dissolution or the filing with the nonprofit corporation of the written consent of members (Corp. Code § 6830) or when the order for involuntary dissolution is entered (Corp. Code § 6920).

Subdivision (b) is the same in substance as the second sentence of subdivision (b) of Section 1805. The first sentence of subdivision (c) is the same in substance as a portion of subdivision (b) of Section 1903 except that it is made clear in subdivision (c) of Section 7031 that the board's power continues before and after the filing of a decree of dissolution as well as before and after the filing of a certificate of dissolution. The second sentence of subdivision (c) is the same in substance as Section 2001 except that no reference is made to provisions

comparable to Sections 1200 and 1201 or Chapter 13 of General Corporation Law since such provisions have not been included in the General Nonprofit Corporation Law.

368/262

§ 7032

Subdivision (a) Tentatively Approved May 1976

Renumbered May 1976

Subdivision (b) Not Approved

§ 7032. Notice of winding up

7032. (a) The board shall cause written notice of the commencement of the proceeding for winding up to be given by mail to all members and to all known creditors and claimants whose addresses appear on the records of the nonprofit corporation except under either of the following conditions:

(1) Upon application and good cause shown in a proceeding for involuntary dissolution or in a proceeding for voluntary dissolution over which the court has assumed jurisdiction pursuant to Section 6921, the court provides for notice to be given other than by mail.

(2) The order for winding up has been stayed by appeal therefrom or otherwise, or the proceeding or the execution of the order has been enjoined.

(b) In any proceeding for voluntary dissolution or in a proceeding for involuntary dissolution when the court has made an order that the nonprofit corporation shall be wound up and dissolved, such written notice may direct creditors and claimants to make and present claims and

proofs to the person, at the place, and within the time specified in the notice.

Comment. Subdivision (a) of Section 7032 is the same in substance as the second sentence of subdivision (c) of Section 1805 (General Corporation Law) and the second sentence of subdivision (c) of Section 1903 except that subdivision (a) gives the court the authority to provide for notice other than by mail.

Subdivision (b) is based on a portion of the first sentence of subdivision (b) of Section 1807. Subdivision (b) is permissive. If the notice provided by Section 7032 does not contain a direction for presentation of claims, such direction must be later provided in a separate notice. See Corp. Code § 7040.

Note. The Commission has raised but has not resolved the question of whether notice to members should be limited to those members entitled to vote or share in the assets on distribution.

405/978

§ 7033

Tentatively Approved
May 1976

Renumbered May 1976

§ 7033. Filling a vacancy on board of directors

7033. A vacancy on the board may be filled during a winding up proceeding in the manner provided in Section 5326.

Comment. Section 7033 is the same in substance as Section 2002 (General Corporation Law). The term "vacancy" is defined in Section [192 of General Corporation Law].

Tentatively Approved
May 1976

Renumbered May 1976

§ 7034. Petition to determine or appoint directors

7034. When the identity of the directors or their right to hold office is in doubt, or if they are dead or unable to act, or they fail or refuse to act or their whereabouts cannot be ascertained, any interested person may petition the superior court of the proper county to determine the identity of the directors or, if there are no directors, to appoint directors to wind up the affairs of the nonprofit corporation, after hearing upon such notice to such persons as the court may direct.

Comment. Section 7034 is the same in substance as Section 2003 (General Corporation Law). The term "proper county" is defined in Section 5177.

Subdivision (a) Tentatively Approved May 1976

Renumbered May 1976

Subdivision (b) Not Approved

Article 4. Presentation of Claims

§ 7040. Time to present claims; notice to creditors and claimants

7040. (a) All creditors and claimants may be barred from participation in any distribution of the general assets if they fail to make and present claims and proofs within such time as the court may direct, which shall not be less than four nor more than six months after notice has first been given to creditors and claimants pursuant to Section 7032 unless it appears by affidavit that there are no claims, in which case the time limit may be three months. If it is shown that a creditor or claimant did not receive notice because of absence from the state or other cause, the court may allow a claim to be filed or presented at any time before distribution is completed.

(b) If the notice of winding up given pursuant to Section 7032 did not contain the statement provided in subdivision (b) of Section 7032, the board shall cause separate written notice to be given by mail, or by such other method as the court may provide, directing creditors and claimants to make and present claims and proofs to the person, at the place and within the time specified in the notice. Such notice shall be given to each person shown as a creditor or claimant on the books of the nonprofit corporation, at such person's last known address.

Comment. Section 7040 is comparable to subdivisions (a) and (b) of Section 1807 (General Corporation Law). Under Section 7032, written notice of the commencement of the proceeding shall be given by mail to

members and creditors unless the court provides for notice other than by mail. Such notice may direct creditors and claimants to present claims at the time and place specified in the notice (see Corp. Code § 7032) or, under subdivision (b) of Section 7040, such notice shall be given separately.

999/339

§ 7041

Tentatively Approved
May 1976

Renumbered May 1976

§ 7041. Holders of secured claims

7041. Holders of secured claims may prove for the whole debt in order to realize any deficiency. If such creditors fail to present their claims, they shall be barred only as to any right to claim against the general assets for any deficiency in the amount realized on their security.

Comment. Section 7041 is the same in substance as subdivision (c) of Section 1807 (General Corporation Law).

Tentatively Approved
May 1976

Renumbered May 1976

§ 7042. Unmatured, contingent, or disputed claims

7042. Before any distribution is made, the amount of any unmatured, contingent, or disputed claim against the nonprofit corporation which has been presented and has not been disallowed, or such part of any such claim as the holder would be entitled to if the claim were due, established, or absolute, shall be paid into court and there remain to be paid over to the party when the party becomes entitled thereto or, if the party fails to establish a claim, to be paid over or distributed with the other assets of the nonprofit corporation to those entitled thereto; or such other provision for the full payment of such claim, if and when established, shall be made as the court may deem adequate. A creditor whose claim has been allowed but is not yet due shall be entitled to its present value upon distribution.

Comment. Section 7042 is the same in substance as subdivision (d) of Section 1807 (General Corporation Law).

Tentatively Approved
May 1976

Renumbered May 1976

§ 7043. Time to commence suits on rejected claims

7043. Suits against the nonprofit corporation on claims which have been rejected shall be commenced within 30 days after written notice of rejection thereof is given to the claimant.

Comment. Section 7043 is the same in substance as subdivision (e) of Section 1807 (General Corporation Law).

Tentatively Approved
February 1976

Renumbered May 1976

Article 5. Distribution of Assets

§ 7050. Distribution after payment of debts

7050. (a) After determining that all the known debts and liabilities of a nonprofit corporation in the process of winding up have been paid or adequately provided for, the board shall distribute all the remaining corporate assets in the manner provided in this article.

(b) If the winding up is by court proceeding or subject to court supervision, the distribution shall not be made until after the expiration of any period for the presentation of claims which has been prescribed by order of the court.

Comment. Subdivision (a) of Section 7050 is the same in substance as the first sentence of Section 2004 (General Corporation Law). It continues the portion of the first paragraph of former Section 9801 that related to payment or adequate provision for debts and obligations of the nonprofit corporation. Payment of a debt or liability has been adequately provided for if the conditions of Section 7051 are satisfied. For recovery of assets distributed to members without compliance with this section, see Section 7058.

Subdivision (b) is the same in substance as the second sentence of Section 2004 (General Corporation Law).

Distribution of assets of a nonprofit corporation on dissolution may be made only after the requirements of Section 7050 are satisfied. Distribution of assets generally is provided for in Section 7054 (distribution among members or in accordance with articles). There are special rules for assets held on condition requiring return (Section 7052), assets held on trust or by a charitable corporation (Section 7053), and assets held by a subordinate body (Section 5214).

Tentatively Approved
February 1976

Renumbered May 1976

§ 7051. Adequate provision for payment of debts and liabilities

7051. (a) The payment of a debt or liability, whether the whereabouts of the creditor is known or unknown, has been adequately provided for if the payment has been provided for by either of the following

means:

(1) Payment thereof has been assumed or guaranteed in good faith by one or more financially responsible persons or by the United States government or any agency thereof, and the provision (including the financial responsibility of such persons) was determined in good faith and with reasonable care by the board to be adequate at the time of any distribution of the assets by the board pursuant to this article.

(2) The amount of the debt or liability has been deposited as provided in Section 7057.

(b) This section does not prescribe the exclusive means of making adequate provision for debts and liabilities.

Comment. Section 7051 is the same in substance as Section 2005 (General Corporation Law). It continues provisions applicable to non-profit corporations by former Section 5001 through former Section 9800. "Financially responsible persons" includes financially responsible corporations. See Corp. Code § 18 ("person" includes "corporation").

Tentatively Approved
January 1976

Renumbered May 1976

§ 7052. Return of assets held on condition

7052. Assets held by a nonprofit corporation upon condition requiring return, transfer, or conveyance, which condition occurs by reason of the dissolution, shall be returned, transferred, or conveyed in accordance with such requirements.

Comment. Section 7052 is new. It is comparable to Section 46 of the ALI-ABA Model Nonprofit Corporation Act. Section 7052 is consistent with the common law in California and is a special application of the general rule requiring that the charitable intent of the donor be carried out whether this is necessitated by dissolution of the donee corporation or for any other reason. See In re Los Angeles County Pioneer Society, 40 Cal.2d 852, 865-866, 257 P.2d 1, 9 (1953), cert. denied, 346 U.S. 888 (1953).

Substance Tentatively
Approved February 1976

Renumbered May 1976

§ 7053. Disposition of assets held on trust or by charitable corporation

7053. (a) Those assets held by a nonprofit corporation on a charitable trust and all of the assets held by a nonprofit corporation organized for charitable purposes shall be disposed of on dissolution in conformity with the purposes of the charitable trust or the charitable purposes for which the nonprofit corporation was organized.

(b) Except as provided in subdivision (c), the disposition required in subdivision (a) shall be made by decree of the superior court of the proper county in proceedings to which the Attorney General is a party. The decree shall be made upon petition therefor by the Attorney General or, upon thirty days' notice to the Attorney General, by any person concerned in the dissolution.

(c) The disposition required in subdivision (a) may be made without the decree of the superior court, subject to the rights of persons concerned in the dissolution, if the Attorney General makes a written waiver of objections to the disposition.

Comment. Section 7053 continues the substance of the second paragraph of former Section 9801. The disposition of assets provided in Section 7053 applies only where the assets are not held on condition requiring return, transfer, or conveyance. See Section 7052.

Subdivision (a) applies both to assets received on express trust for charitable purposes and to assets received by a charitable corporation whether or not on trust. A nonprofit corporation organized exclusively for charitable purposes holds its assets in trust for the purposes enumerated in its articles of incorporation even though they were not otherwise expressly ear-marked for charitable trust purposes when acquired by the corporation. See, e.g., Pacific Home v. County of Los Angeles, 41 Cal.2d 844, 257 P.2d 1 (1953). Whether a nonprofit corporation is deemed to be a charitable corporation for the purposes of subdivision (a) is a question of fact to be determined by reference not only to its articles of incorporation but also to the manner of conducting its activities. See, e.g., Lynch v. Spilman, 67 Cal.2d 251, 431 P.2d 636, 62 Cal. Rptr. 12 (1967); In re Los Angeles County Pioneer Society, 40 Cal.2d 852, 257 P.2d 1, cert. denied, 346 U.S. 888 (1953). Charitable purposes are not defined by statute but left to judicial development.

Subdivision (a) also has the effect of preserving the doctrine of cy pres. Former Section 9801 was silent as to this point, but case law

required application of the cy pres doctrine. See, e.g., In re Veterans' Industries, Inc., 8 Cal. App.3d 902, 88 Cal. Rptr. 303 (1970); Metropolitan Baptist Church of Richmond, Inc. v. Younger, 48 Cal. App.3d 850, 121 Cal. Rptr. 899 (1975).

Subdivision (b) continues the provision of former Section 9801 that required a court decree of distribution. The decree is made upon petition therefor by the Attorney General or by an interested party after 30 days' notice to the Attorney General. It should be noted that, although the Attorney General is a party to the court proceeding, the ultimate responsibility for the proper application of the standard of subdivision (a) rests with the court. In re Veterans' Industries, Inc., supra.

Subdivision (c) is new. It permits disposition of charitable assets without court decree upon waiver of objections by the Attorney General. A nonprofit corporation may seek a court decree even though the Attorney General has waived objections, and the waiver of objections binds only the Attorney General and not other interested parties, such as the donor or other potential distributees.

992/926

§ 7054

Tentatively Approved
February 1976

Renumbered May 1976

§ 7054. Distribution among members or in accordance with bylaws

7054. Unless otherwise provided in this division, assets held by a nonprofit corporation shall be distributed on dissolution among the members in accordance with their respective rights therein or disposed of in such other manner as may be provided in the bylaws.

Comment. Section 7054 continues the substance of that portion of the first paragraph of former Section 9801 that related to distribution of assets to members or as otherwise provided in the articles, with the

addition of a provision permitting provision otherwise in the bylaws. See Sections 5155.5 ("bylaws" includes articles) and 5251 (articles may contain provisions permitted in bylaws). For a comparable provision, see Section 2004 (General Corporation Law) (distribution of remaining corporate assets among shareholders according to their respective rights and preferences). Section 7054 governs distribution of the remaining assets of a nonprofit corporation on dissolution unless the assets fall within the terms of Section 7052 (return of assets held on condition), 7053 (disposition of assets held on trust or by charitable corporation), or 5214 (delivery of assets held by subordinate body).

The respective rights of the members are determined by reference to the bylaws. Absent relevant classifications, the property rights of members are equal. See Section 5401. The bylaws may, however, provide a disposition of assets other than distribution to members.

It should be noted that, if assets of a nonprofit corporation are distributable to members on dissolution, the nonprofit corporation will not qualify for income tax exemption under Revenue and Taxation Code Section 2370d or Internal Revenue Code Section 501(c)(3). Moreover, the memberships will be "securities" within the meaning of the Corporate Securities Law of 1968 and may not be exempt from the qualification requirements of that law. See Sections 25019 and 25100(j); see also California Corporations Commissioner, Release 15-C (May 15, 1970).

404/359

§ 7055

Tentatively Approved
February 1976

Renumbered May 1976

§ 7055. Manner of distribution.

7055. (a) Unless the bylaws otherwise provide, distribution of assets may be made either in money or in property or securities and either in installments from time to time or as a whole, if this can be

done fairly and ratably and in conformity with the rights of the distributees.

(b) Distribution of assets shall be made as soon as reasonably consistent with the beneficial liquidation of corporate assets.

Comment. Section 7055 is the same in substance as Section 2006 (General Corporation Law). It continues provisions applicable to non-profit corporations by former Sections 5002 and 5003 through former Section 9800. Section 7055 applies only to distributions among members or other distributees where there are no contrary requirements in the bylaws. Where the bylaws provide otherwise, the distribution is not made pursuant to Section 7055 but is made in accordance with the requirements of the bylaws.

4057980

§ 7056

Tentatively Approved
May 1976
Renumbered May 1976

§ 7056. Plan of distribution of securities or assets in kind

7056. (a) Notwithstanding any provision in the bylaws for two or more classes of membership with one or more classes of membership having a liquidation preference payable in cash upon distribution of the assets, a plan of distribution of any assets other than money which provides that such distribution is in complete or partial satisfaction of the members' rights pursuant to such liquidation preference may be adopted if approved by the board and by the members of each class regardless of any limitation or restriction of voting rights.

(b) A plan of distribution so approved shall be binding on all the members except as provided in subdivision (c). The board shall cause notice of the adoption of the plan to be given by mail within 20 days after its adoption to all members having a liquidation preference.

(c) Members having a liquidation preference who dissent from the plan of distribution are entitled to be paid the amount of their liquidation preference in cash if they file written demand for payment with the nonprofit corporation within 30 days after the date of mailing of the notice of the adoption of the plan of distribution, unless the plan of distribution is abandoned. The demand shall state the member's liquidation preference and the amount of the cash distribution to which the member is entitled.

(d) If any such demand for cash payment is filed, the board in its discretion may abandon the plan without further approval by the membership, and all members shall then be entitled to distribution according to their rights and liquidation preferences.

Comment. Section 7056 is similar to Section 2007 (General Corporation Law). Under Section 7055, distribution of assets may be made "in property or securities" if it can be done "in conformity with the rights of the distributees." Section 7056 contemplates that the articles or bylaws may provide for more than one class of membership, with one class having preferred rights on distribution payable in cash, and authorizes a procedure for distribution in kind notwithstanding such a provision in the articles or bylaws. See Corp. Code § 5155.5 ("bylaws" includes articles). The requirement of approval "by the members of each class" means approval by majority vote unless a greater proportion is required by the articles or by any voting agreement. Corp. Code § [152 of General Corporation Law].

Tentatively Approved
February 1976

Renumbered May 1976

§ 7057. Deposit of distribution to creditors, members, and other persons

7057. (a) This section applies to a creditor, member, or other person entitled to assets of a nonprofit corporation in all of the following cases:

(1) The person is unknown or fails to accept a payment or distribution.

(2) The person cannot be found after diligent inquiry.

(3) The existence or amount of the person's claim is contingent, contested, or not determined.

(4) The ownership of the person's membership is in dispute.

(b) In cases described in subdivision (a), the nonprofit corporation may deposit the payment or distribution or the maximum amount of the claim with the State Treasurer or with a bank or trust company in this state in trust for the benefit of the person lawfully entitled thereto. The payment or distribution shall be paid over by the depository to the lawful owner, the owner's representative, or assigns upon satisfactory proof of title.

(c) For the purpose of providing for the transmittal, receipt, accounting for, claiming, management, and investment of all amounts deposited in the State Treasury under the provisions of subdivision (b), the deposit shall be deemed to be paid or delivered for deposit in the State Treasury under the provisions of Chapter 7 (commencing with Section 1500) of Title 10 of Part 3 of the Code of Civil Procedure and may be recovered in the manner prescribed therein.

Comment. Section 7057 is the same in substance as Section 2008 (General Corporation Law). Subdivisions (a) and (b) continue provisions applicable to nonprofit corporations by former Sections 5009 and 5010 through former Section 9800. Subdivision (c) continues provisions applicable to nonprofit corporations by former Section 5011 through former Section 9800.

404/357

§ 7058

Not Approved; See Minutes

Tentatively Approved
May 1976

Renumbered May 1976

§ 7058. Recovery of improper distribution to members

7058. (a) Whenever in the process of winding up a nonprofit corporation a distribution of assets has been made, otherwise than under an order of court, without prior payment or adequate provision for payment of any of the debts and liabilities of the nonprofit corporation, the amount so improperly distributed to any member may be recovered by the nonprofit corporation. Any of such members may be joined as defendants in the same action or brought in on the motion of any other defendant.

(b) Suit may be brought in the name of the nonprofit corporation by one or more creditors of the nonprofit corporation, whether or not they have reduced their claims to judgment, to enforce the liability under subdivision (a), against any or all members receiving the distribution.

(c) A member who satisfies a liability under this section has the right of ratable contribution from other members similarly liable. A member who has been compelled to return to the nonprofit corporation

more than the member's ratable share of the amount needed to pay the debts and liabilities of the nonprofit corporation may require that the nonprofit corporation recover from any or all of the other members such proportion of the amounts received by them upon the improper distribution as to give contribution to those held liable under this section and make the distribution of assets fair and ratable, according to the respective rights of the members, after payment or adequate provision for payment of all the debts and liabilities of the nonprofit corporation.

(d) As used in this section, "process of winding up" includes proceedings under Chapters 18 and 19 and also any other distribution of assets to members made in contemplation of termination or abandonment of the corporate activities.

Comment. Section 7058 is the same in substance as Section 2009 (General Corporation Law). It continues provisions applicable to nonprofit corporations by former Section 5012 through former Section 9800. Although a nonprofit corporation may make distributions to persons or groups other than members (see Sections 7052-7054), Section 7058 is limited to recovery of distributions made to members.

The remedy provided in subdivision (b), allowing creditors to sue in the name of the corporation for improper distribution to members, is not exclusive, and the creditors may pursue any other remedies afforded by law.

The directors may be liable for improper distributions to members or other distributees pursuant to Section 5374. For the obligation to pay or adequately provide for debts and liabilities, prior to distribution, see Section 7050. Adequate provision for debts and liabilities is defined in Section 7051.

Note. The staff has not yet drafted provisions relating to the liability of directors.

Substance Tentatively Approved May 1976

Renumbered May 1976

Article 6. Cessation of Corporate Existence

§ 7060. Order declaring nonprofit corporation duly wound up and dissolved

7060. The order authorized in subdivision (t) of Section 7010 shall declare:

(a) That the nonprofit corporation has been duly wound up.

(b) That any tax or penalty due under the Bank and Corporation Tax Law has been paid or secured or that no such tax or penalty is due, and that its other known debts and liabilities have been paid or adequately provided for, or that such taxes, penalties, debts, and liabilities have been paid as far as its assets permitted, as the case may be. If there are known debts or liabilities for payment of which adequate provision has been made, the order shall state what provision has been made, setting forth the name and address of the corporation, person, or governmental agency that has assumed or guaranteed the payment, or the name and address of the depository with which deposit has been made or such other information as may be necessary to enable the creditor or other person to whom payment is to be made to appear and claim payment of the debt or liability.

(c) That all known assets have been distributed to members, disposed of in conformity with the purposes of the charitable trust or the charitable purposes for which the nonprofit corporation was organized, or applied on account of the nonprofit corporation's debts and liabilities.

(d) That the accounts of directors or other persons appointed to conduct the winding up have been settled and that they are discharged from their duties and liabilities to creditors and members.

(e) That the nonprofit corporation is dissolved.

Comment. Section 7060 is the same in substance as paragraphs (1) through (4) of subdivision (a) of Section 1808 (General Corporation Law) except that subdivision (c) of Section 7060 takes into account that assets held on charitable trust shall be disposed of on dissolution in conformity with the purposes of such trust or the charitable purposes for which the nonprofit corporation was organized. See Corp. Code § 7053.

There should be no tax or penalty due under subdivision (b) for nonprofit corporations which have timely obtained a tax exemption pursuant to Section 23701 of the Revenue and Taxation Code.

404/301

§ 7061

Substance Tentatively Approved May 1976

Renumbered May 1976

§ 7061. Cessation of corporate existence; continued existence for some purposes

7061. (a) Except as provided in this section, corporate existence shall cease (1) upon the making of the order pursuant to Section 6923 or Section 7060 declaring that the nonprofit corporation is dissolved or (2) upon the filing of the certificate of dissolution pursuant to Section 6922.

(b) A nonprofit corporation which is dissolved nevertheless continues to exist for the purpose of winding up its affairs, prosecuting

and defending actions by or against it, collecting and discharging obligations, disposing of and conveying its property, and collecting and dividing its assets.

(c) A nonprofit corporation which is dissolved nevertheless continues to exist indefinitely for the purpose of being sued in any quiet title action.

(d) No action or proceeding to which a nonprofit corporation is a party abates by the dissolution of the nonprofit corporation or by reason of proceedings for winding up and dissolution thereof.

(e) Any assets inadvertently or otherwise omitted from the winding up continue in the dissolved nonprofit corporation for the benefit of the persons entitled thereto upon dissolution of the nonprofit corporation and on realization shall be distributed accordingly.

Comment. Subdivision (a) of Section 7061 is the same in substance as the second sentence of subdivision (k) of Section 1806 (General Corporation Law), a portion of subdivision (b) of Section 1808, and a portion of the first sentence of subdivision (b) of Section 1905.

Subdivision (b) is the same in substance as subdivision (a) of Section 2010. Under subdivision (b), the nonprofit corporation may continue its activities only to the extent necessary for the winding up thereof.

Subdivision (c) is the same in substance as the first sentence of subdivision (c) of Section 2011.

Subdivision (d) is the same in substance as subdivision (b) of Section 2010.

Subdivision (e) is the same in substance as subdivision (c) of Section 2010.

Substance Tentatively Approved May 1976

Renumbered May 1976

§ 7062. Suits against dissolved nonprofit corporation

7062. (a) In all cases where a nonprofit corporation has been dissolved, the members may be sued in the corporate name of such nonprofit corporation upon any cause of action against the nonprofit corporation arising prior to its dissolution.

(b) Summons or other process against such a nonprofit corporation may be served by delivering a copy thereof to an officer, director, or person having charge of its assets or, if no such person can be found, to any agent upon whom process might be served at the time of dissolution. If none of such persons can be found with due diligence and it is so shown by affidavit to the satisfaction of the court, then the court may make an order that summons or other process be served upon the dissolved nonprofit corporation by delivering a copy thereof, together with a copy of the order, to the Secretary of State or an assistant or deputy secretary of state. Service in this manner is deemed complete on the tenth day after such delivery.

(c) Any judgment rendered in a quiet title action shall bind each and all of the members of the nonprofit corporation or other persons having any equity or other interest in such nonprofit corporation to the extent of their interest therein. The court in which such quiet title action is pending has all of the jurisdiction provided in Sections 410.50 and 410.60 of the Code of Civil Procedure. Service of summons or other process in any such action may be made as provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure or as provided in subdivision (b).

(d) Upon receipt of such process and the fee therefor prescribed in the Government Code, the Secretary of State forthwith shall give notice to the nonprofit corporation as provided in Section 14853.

Comment. Subdivision (a) of Section 7062 is the same in substance as the first sentence of subdivision (a) of Section 2011. Subdivision (a) is procedural in nature and is not intended to determine liability.

Subdivision (b) is the same in substance as subdivision (b) of Section 2011. Subdivision (c) is the same in substance as the second and third sentences of subdivision (c) of Section 2011. Subdivision (d) is the same in substance as subdivision (d) of Section 2011. The Secretary of State's fee for acceptance of copies of process is prescribed in Section 12206 of the Government Code.

Tentatively Approved

May 1976

Renumbered May 1976

**Article 7. Conditions for Dissolution of Regulated
Nonprofit Corporations**

§ 7070. Conditions for dissolution of regulated nonprofit corporations

7070. (a) No proceedings may be maintained by any person specified

in Sections 6810, 6910, or 6911 for the voluntary or involuntary disso-

lution of a nonprofit corporation which is subject to the Public Utili-

ties Act unless an order is obtained from the Public Utilities Commis-

sion authorizing the nonprofit corporation either to dispose of its

assets as provided in Section 851 of the Public Utilities Code or to

dissolve.

(b) No proceedings may be maintained by any person specified in

Sections 6810, 6910, or 6911, for the voluntary or involuntary dissolu-

tion of a nonprofit corporation which is subject to the provisions of

Article 14 (commencing with Section 1010) of Chapter 1 of Part 2 of

Division 1 of the Insurance Code when the application authorized by

Section 1011 of the Insurance Code has been filed by the Insurance

Commissioner unless the consent of the Insurance Commissioner has been

obtained.

Comment. Section 7070 supersedes the provisions of former Section 4650 which authorized proceedings for involuntary dissolution of a corporation "other than" one subject to the regulatory provisions of certain enumerated statutes. Compare Section 1800(d) (General Corporation Law).

Subdivision (a) restates existing law. A nonprofit corporation which is operating a public utility business may not dispose of such business without the consent of the Public Utilities Commission. See Pub. Util. Code § 851; Grover v. Sharp & Fellows Contracting Co., 82 Cal. App.2d 515, 518, 186 P.2d 682, ___ (1947); Slater v. Shell Oil Co., 39 Cal. App.2d 535, 548, 103 P.2d 1043, ___ (1940). Once such consent has been obtained, however, the corporation may dissolve in the same manner as any other corporation. See Slater v. Shell Oil Co., supra.

Subdivision (b) applies a similar rule to a nonprofit corporation operating an insurance business when the Insurance Commissioner has commenced a proceeding to obtain control of its assets as provided in Section 1011 of the Insurance Code. When the conditions specified in Section 1011 exist, the Insurance Commissioner is empowered to commence a court proceeding, to take possession of all of the property of the corporation, and to apply for an order, which the court "shall make," dissolving the corporation. Ins. Code §§ 1011, 1017. Under subdivision (b), when such proceedings have been commenced, the Insurance Commissioner's consent must be obtained before the nonprofit corporation may undertake voluntary or involuntary dissolution proceedings.

CHAPTER 23. TRANSITIONAL PROVISIONS

[Not included--To be considered at June 1976 Meeting]

DIVISION 4. PROVISIONS APPLICABLE TO
CORPORATIONS GENERALLY

CHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS

Article 1. Definitions

- § 14400. Definitions
- § 14401. Applicability of definitions in Divisions 1 and 2
- § 14402. Business
- § 14403. Corporation; domestic corporation; foreign corporation
- § 14404. Foreign lending institution
- § 14405. Transact intrastate business

Article 2. General Provisions

- § 14450. Scope of division
- § 14451. Suit against corporation or association
- § 14452. Subjection of corporate property to attachment
- § 14453. Money; issuance and circulation
- § 14454. Federal corporations
- § 14455. Information to assessor
- § 14456. Amendment or repeal; reservation of power; savings clause

CHAPTER 2. CORPORATE NAME

Article 1. Reservation of Corporate Name

- § 14500. Reservation of corporate name

Article 2. Permissible Corporate Name

- § 14510. Name which tends to deceive
- § 14511. Agreement to use name that is substantially the same
- § 14512. Name which is likely to mislead or contains the word "charitable"

Article 3. Sanctions for Name Violations

- § 14515. Sanctions for name violations

CHAPTER 3. FILING OF INSTRUMENTS;
CERTIFICATES OF CORRECTION

Article 1. Application of Chapter

- § 14520. Application of chapter

Article 2. Filing of Instruments

- § 14530. Filing by Secretary of State
- § 14531. Delayed effective date of instruments
- § 14532. Revocation certificates
- § 14533. Instruments conforming to law
- § 14534. Filing fees

Article 3. Certificates of Correction

- § 14535. Correction of instruments
- § 14536. Contents of certificate of correction
- § 14537. Execution of certificate of correction
- § 14538. Limitations on certificate of correction
- § 14539. Effective date of corrected instrument unaffected by filing certificate of correction
- § 14540. Rights and liabilities affected by filing certificate of correction

Article 4. Record of Process Served on Secretary of State

- § 14545. Record of process served on Secretary of State

CHAPTER 4. SERVICE OF PROCESS ON DOMESTIC CORPORATIONS

Article 1. Manner of Service Generally

- § 14550. Additional method for serving domestic corporation

Article 2. Service on Designated Agent

- § 14560. Service on designated agent for service

Article 3. Service on Secretary of State

- § 14570. Service on Secretary of State
- § 14571. Notice to corporation

CHAPTER 5. STATEMENT IDENTIFYING OFFICERS, OFFICE,
AND AGENT FOR SERVICE

- § 14600. Applicable filing period defined
- § 14601. Statement identifying directors, officers, and offices
- § 14602. Statement required of nonprofit corporation
- § 14603. Designation of agent for service
- § 14604. Change of agent for service or agent's address
- § 14605. Statement of resignation as agent; notice to corporation
- § 14606. When designation of new agent required

- § 14607. Renewal forms
- § 14608. New statement supersedes previous statement; disposal of superseded statement
- § 14609. Statement not construed as notice
- § 14610. Procedure upon failure to file statement
- § 14611. Qualification of corporation as agent for service

CHAPTER 6. [RESERVED]

CHAPTER 7. [RESERVED]

CHAPTER 8. [RESERVED]

CHAPTER 9. FOREIGN CORPORATIONS

Article 1. General Provisions

- § 14860. Application of chapter
- § 14861. Foreign insurers
- § 14862. Foreign lending institutions
- § 14863. Liability of directors

Article 2. Qualification to Transact Intrastate Business

- § 14865. Certification of qualification required
- § 14866. Filing statement and designation
- § 14867. Issuance of certificate
- § 14868. Amended statement and designation; when required
- § 14869. Surrender of right to transact intrastate business
- § 14870. Merger or consolidation; surrender of right to transact intrastate business
- § 14871. Penalty for unauthorized transaction of intrastate business
- § 14872. Disability to maintain action upon intrastate business

Article 3. Corporate Name

- § 14875. Intrastate business prohibited unless proper corporate name
- § 14876. Exception where use of name by other corporation enjoined
- § 14877. Exception for foreign corporation making agreement with Secretary of State
- § 14878. Registration of name by foreign corporation not transacting intrastate business

Article 4. Service of Process

- § 14880. Additional method of service
- § 14881. Service on officer, manager, or agent
- § 14882. Court order for service on Secretary of State
- § 14883. Notice to corporation
- § 14884. Service upon unqualified corporation transacting intrastate business
- § 14885. Service upon corporation that has surrendered, forfeited, or withdrawn right to transact intrastate business

CHAPTER 10. CRIMES

- § 14900. Fraudulent issuance of shares or memberships
- § 14901. Fictitious or fraudulent subscriptions
- § 14902. Fraudulent payment or distribution
- § 14903. False report or statement; refusal to keep book or post notice
- § 14904. Fraudulent records
- § 14905. Exhibition of false records to public officer
- § 14906. Unauthorized use of names
- § 14907. Transacting intrastate business without qualification
- § 14908. Transacting intrastate business as agent for unauthorized foreign corporation
- § 14909. Foreign incorporation as defense

404/287

SEC. . Division 4 (commencing with Section 14400) is added to

Title 1 of the Corporations Code, to read:

**DIVISION 4. PROVISIONS APPLICABLE
TO CORPORATIONS GENERALLY**

CHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS

Article 1. Definitions

404/294

§ 14400
Staff Draft May 1976

§ 14400. Definitions

14400. Unless the provision or the context otherwise requires, the definitions set forth in this article govern the construction of this division.

Comment. Section 14400 is the same in substance as former Section 101.

404/288

§ 14401
Staff Draft May 1976

§ 14401. Applicability of definitions in divisions 1 and 2.

14401. For the purposes of this division, unless otherwise provided in this division:

(a) In the case of a corporation organized under Division 2 (commencing with Section 5000) or subject to that division, the definitions set forth in Division 2 apply to this division.

§ 14402

(b) In the case of a corporation other than one described in subdivision (a), the definitions set forth in Division 1 (commencing with Section 100) apply to this division.

Comment. Section 14401 is included to avoid the need to duplicate in this division the definitions contained in Division 1 and Division 2. It should be noted that some special definitions are provided in this article, and these definitions apply instead of the definition of the same word or phrase in Division 1 or Division 2.

404/289

§ 14402
Staff Draft May 1976

§ 14402. Business

14402. In the case of a nonprofit corporation, "business" means any or all of the corporate activities.

Comment. Section 14402 provides a definition that is useful in making phrases such as "transact interstate business" applicable to nonprofit corporations. The definition provided by Section 14402 does not expand the definition of "transact intrastate business" provided by Section 14404 to include activities that do not constitute transacting intrastate business under that section. For a somewhat similar definition, see Section 7103 of the Pennsylvania Corporation Not-for-profit Code.

§ 14403. Corporation; domestic corporation; foreign corporation

14403. (a) "Corporation," unless otherwise expressly provided, refers only to a domestic corporation.

(b) "Domestic corporation" means a corporation formed under the laws of this state, and "foreign corporation" means any other corporation including a foreign association. "Foreign corporation," as used in Chapter 9 (commencing with Section ___) does not include a corporation or association chartered under the laws of the United States.

Comment. Section 14403 is the same in substance as former Section 106 except for the last sentence which is drawn from Section 171.

Cross-Reference:

"Foreign association" defined, § 170.

§ 14404... Foreign lending institution

14404. "Foreign lending institution" includes but is not limited to a foreign banking corporation, a foreign corporation all of the capital stock of which is owned by one or more foreign banking corporations, a foreign savings and loan association, a foreign insurance company, or a foreign corporation or association authorized by its charter to invest in loans secured by real and personal property, whether organized under the laws of the United States or of any other state, district, or territory of the United States.

Comment. Section 14404 is the same in substance as a portion of subdivision (d) of Section 191 (General Corporation Law), as amended by Chapter _____ of the Statutes of 1976.

404/340

§ 14405
Staff Draft May 1976

§ 14405. Transact intrastate business

14405. (a) "Transact intrastate business" means entering into repeated and successive transactions of its business in this state, other than interstate or foreign commerce.

(b) A foreign corporation shall not be considered to be transacting intrastate business merely because its subsidiary transacts intrastate business.

(c) Without excluding other activities which may not constitute transacting intrastate business, a foreign corporation shall not be considered to be transacting intrastate business within the meaning of subdivision (a) solely by reason of carrying on in this state one or more of the following activities:

(1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.

(2) Holding meetings of its board, shareholders, or members, or carrying on other activities concerning its internal affairs.

(3) Maintaining bank accounts.

(4) Maintaining offices or agencies for the transfer, exchange, and registration of its memberships or securities or depositaries with relation to its memberships or securities.

(5) Effecting sales through independent contractors.

(6) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance outside this state before becoming binding contracts.

(7) Creating evidences of debt or mortgages, liens, or security interests on real or personal property.

(8) Conducting an isolated transaction completed within a period of 180 days, and not in the course of a number of repeated transactions of like nature.

(9) Granting funds by a nonprofit corporation.

(d) Without excluding other activities which may not constitute transacting intrastate business, a foreign lending institution shall not be considered to be doing, transacting or engaging in business in this state solely by reason of engaging in any or all of the following activities either on its own behalf or as a trustee of a pension plan, employee profit sharing or retirement plan, testamentary or inter vivos trust, or in any other fiduciary capacity:

(1) The acquisition by purchase, by contract to purchase, by making of advance commitments to purchase, or by assignment of loans, secured or unsecured, or any interest therein, if such activities are carried on from outside this state by the foreign lending institution.

(2) The making by an officer or employee of physical inspections and appraisals of real or personal property securing or proposed to secure any loan, if the officer or employee making any physical inspection or appraisal is not a resident of and does not maintain a place of business for such purpose in this state.

§ 14405

(3) The ownership of any loans and the enforcement of any loans by trustee's sale, judicial process, or deed in lieu of foreclosure or otherwise.

(4) The modification, renewal, extension, transfer, or sale of loans or the acceptance of additional or substitute security therefor or the full or partial release of the security therefor or the acceptance of substitute or additional obligors thereon, if the activities are carried on from outside this state by the foreign lending institution.

(5) The engaging by contractual arrangement of a corporation, firm, or association, qualified to do business in this state, which is not a subsidiary or parent of the foreign lending institution and which is not under common management with the foreign lending institution, to make collections and to service loans in any manner whatsoever, including the payment of ground rents, taxes, assessments, insurance, and the like and the making, on behalf of the foreign lending institution, of physical inspections and appraisals of real or personal property securing any loans or proposed to secure any loans, and the performance of any such engagement.

(6) The acquisition of title to the real or personal property covered by any mortgage, deed of trust, or other security instrument by trustee's sale, judicial sale, foreclosure, or deed in lieu of foreclosure, or for the purpose of transferring title to any federal agency or instrumentality as the insurer or guarantor of any loan, and the retention of title to any real or personal property so acquired pending the orderly sale or other disposition thereof.

(7) The engaging in activities necessary or appropriate to carry out any of the foregoing activities.

§ 14405

(e) Nothing contained in subdivision (d) shall be construed to permit any foreign banking corporation to maintain an office in this state otherwise than as provided by the laws of this state or to limit the powers conferred upon any foreign banking corporation as set forth in the laws of this state or to permit any foreign lending institution to maintain an office in this state except as otherwise permitted under the laws of this state.

Comment. Section 14405 is the same in substance as Section 191 (General Corporation Law) as amended by Chapter ___ of the Statutes of 1976, except for modifications to reflect the fact that the term "transact intrastate business" applies to foreign nonprofit corporations as well as to foreign business corporations (see Section 14450) and the addition of paragraph (9) of subdivision (c)--granting funds by a nonprofit corporation. This latter provision is drawn from Section 1301 of the New York Not-for-Profit Corporation Law and Section 8122 of the Pennsylvania Corporation Not-for-profit Code. The New York and Pennsylvania statutes also list "distributing information to its members," but this item has not been included in Section 14852 because it is covered by the broader phrase "carrying on other activities concerning its internal affairs" which appears in paragraph (2) of subdivision (c) of Section 14405.

Cross-Reference:

"Foreign lending institution" defined, § 14404

Article 2. General Provisions§ 14450. Scope of division

14450. The provisions of this division apply to every private corporation, profit or nonprofit, stock or nonstock, now existing or hereafter formed, unless:

(a) The corporation is expressly excepted from the operation thereof;

or

(b) There is a special provision applicable to the corporation inconsistent with some provision of this division, in which case the special provision prevails.

Comment. Section 14450 adopts the substance of the first paragraph of former Section 119. The second paragraph of Section 119 has been omitted as unnecessary.

Note. The provisions of the new General Corporation Law that duplicate provisions of this division would be preserved by subdivision (b) of Section 14450 if it is desired to retain those provisions in the General Corporation Law. However, the duplicating provisions of the new General Corporation Law could be repealed and the duplication thus avoided. Also, it should be noted that the enactment of this division makes it unnecessary to save the comparable provisions of the former General Corporation Law to cover a corporation that (1) is not a nonprofit corporation and (2) is not covered by Section 102 of the new General Corporation Law. The views of the State Bar Committee on Corporations will be solicited to determine whether the duplicating provisions in the new General Corporation Law should be repealed. If those provisions are not repealed, the provisions in new Division 4 would apply to all nonprofit corporations and also to any other corporation that is not covered by the new General Corporation Law unless the provision otherwise provides. See Section 102 (application of new General Corporation Law) as proposed to be amended in Assembly Bill 2849. If the duplicating provisions of the new General Corporation Law are repealed, new Division 4 would apply to all corporations unless some provision otherwise provides.

404/996

STAFF DRAFT
APRIL 1976

§ 14451

Staff Draft April 1976
Renumbered May 1976

§ 14451. Suit against corporation or association

14451. A corporation or association, foreign or domestic, may be sued as provided in the Code of Civil Procedure.

Comment. Section 14451 continues the substance of former Section 128. The phrase "foreign or domestic" has been added.

Note. Enactment of this section would permit the repeal of Section 105.

404/997

§ 14452

Staff Draft April 1976
Renumbered May 1976

§ 14452. Subjection of corporate property to attachment

14452. A corporation shall, as a condition of its existence as a corporation, be subject to the provisions of the Code of Civil Procedure authorizing the attachment of property.

Comment. Section 14452 is based on former Section 126.1, but Section 126.1 was limited in its application to corporations formed under Division 1 of the Corporations Code (General Corporation Law) while Section 14452 is not so limited. This expansion of the scope of application of Section 126.1 is consistent with the scope of the applicability of the Attachment Law itself. See Code Civ. Proc. § 483.010, as amended by [AB 2864, 1976 Regular Session], which permits attachment of property of nonprofit corporations. See the Comment to Section 483.010, printed in Senate Journal for April 22, 1976, discussing scope attachment of property of nonprofit corporations.

Note. The enactment of this section permits the repeal of Section 106.

405/004

§ 14453

Staff Draft April 1976

Renumbered May 1976

§ 14453. Money; issuance and circulation

14453. No corporation, association, or individual shall issue or put in circulation, as money, anything but the lawful money of the United States.

Comment. Section 14453 is the same as former Section 129.

Note. Section 129 was added to the Corporations Code as a result of the work of the Constitution Revision Commission. The section would appear to be more appropriately compiled in the Financial Code, but there is no appropriate place in that code for the section. We have not investigated the need for the provision although we suspect that the matter might be covered by federal law.

Note. The enactment of this section permits the repeal of Section 107.

405/005

§ 14454

Staff Draft April 1976

Renumbered May 1976

§ 14454. Federal corporations

14454. Every corporation organized under the laws of this state, any other state of the United States or the District of Columbia or under an act of the Congress of the United States, all of the capital stock of which is beneficially owned by the United States, an agency or instrumentality of the United States or any corporation the whole of the capital stock of which is owned by the United States or by an agency or instrumentality of the United States, is conclusively presumed to be an agency and instrumentality of the United States and is entitled to all privileges and immunities to which the holders of all of its stock are entitled as agencies of the United States.

Comment. Section 14454 is the same as former Section 123.

Note. The staff is unclear as to the purpose of Section 123, but the section would appear to be one of general application that should not be limited as provided in Section 102.

Note. The enactment of this section permits the repeal of Section 103.

405/931

§ 14455

Tentatively Approved March 1976
Staff Revision and Renumbering April 1976
Renumbered May 1976

§ 14455. Information to assessor

14455. Upon request of an assessor, a domestic or foreign corporation owning, claiming, possessing, or controlling property in this state subject to local assessment shall make available at the corporation's principal office in California or at a place mutually acceptable to the assessor and the corporation a true copy of the records relevant to the amount, cost, and value of all property that it owns, claims, possesses, or controls within the country.

Comment. Section 14455 is the same in substance as Section 1506, which combined the substance of former Sections 3001.1 and 6409.

Note. The enactment of this section permits the repeal of Section 1506.

§ 14456. Amendment or repeal; reservation of power; savings clause

14456. (a) This title of the Corporations Code, and any division, part, chapter, article, or section thereof, and any other statute affecting corporations, may at any time be amended or repealed.

(b) Neither the enactment of this title, nor the amendment, repeal, or reenactment of this title or any portion thereof, nor of any other statute affecting corporations, shall take away or impair any existing liability or cause of action existing or incurred against any corporation, its shareholders, members, directors, or officers incurred prior to the time of such enactment, amendment, repeal, or reenactment.

Comment. Section 14456 continues the substance of former Section 126, but the language of Section 14456 has been rephrased to adopt language used in subdivision (c) of Section 102 and the phrase "and any other statute affecting corporations" has been added to subdivision (a).

Note. The enactment of this section would permit repeal of subdivision (b) of Section 100. Subdivision (c) of Section 102 should be retained.

Policy Issue:

Should subdivision (a) be expanded to include "and any other statute affecting corporations?" Staff recommendation: Yes.

CHAPTER 2. CORPORATE NAME

Article 1. Reservation of Corporate Name

§ 14500. Reservation of corporate name

14500. (a) Any applicant may, upon payment of the fee prescribed therefor in the Government Code, obtain from the Secretary of State a certificate of reservation of corporate name for any name not prohibited by Article 2 (Commencing with Section 14510) and, upon the issuance of the certificate, the name stated therein shall be reserved for a period of 60 days.

(b) The Secretary of State shall not issue certificates reserving the same name for two or more consecutive 60-day periods to the same applicant or for the use or benefit of the same corporation; nor shall consecutive reservations be made by or for the use or benefit of the same corporation of names so similar as to fall within the prohibitions of Section 14510.

Comment. Section 14500 is the same in substance as Section 201(c) (General Corporation Law). It continues provisions of former Section 310. The fee for a certificate of reservation of corporate name is now four dollars. Govt. Code § 12199.

Note. The staff has not yet resolved the problem that may occur where a corporate name reservation expires during a period of dispute over whether the Secretary of State will file corporate articles.

Note. The enactment of this chapter would permit the repeal of subdivisions (b) and (c) of Section 201.

Tentatively Approved February 1976
Staff Revision and Renumbering April 1976
Renumbered May 1976

Article 2. Permissible Corporate Name

§ 14510. Name which tends to deceive

14510. A corporation shall not adopt a name which is the same as, or resembles so closely as to tend to deceive, any of the following:

(a) The name of a domestic corporation.

(b) The name of a foreign corporation which is authorized to transact intrastate business or has registered its name pursuant to Section 14878.

(c) A name which a foreign corporation has assumed under Section 14877.

(d) A name which will become the record name of a domestic or foreign corporation upon the effective date of a filed corporate instrument where there is a delayed effective date pursuant to Section 14531.

(e) A name which is under reservation for another corporation.

Comment. Section 14510 is the same in substance as a portion of Section 201(b) (General Corporation Law). It continues provisions of former Section 310.

Note. The staff has not yet considered whether any of these provisions may be extended to associations which have registered with the Secretary of State.

043/184

§ 14511

Tentatively Approved February 1976
Staff Revision and Renumbering April 1976
Renumbered May 1976

§ 14511. Agreement to use name that is substantially the same

14511. (a) Notwithstanding Section 14510, a corporation may adopt a name that is substantially the same as the name of either of the following:

- (1) An existing domestic corporation.
- (2) A foreign corporation which is authorized to transact intrastate business or has registered its name pursuant to Section 14878.

(b) A corporation may adopt a name pursuant to subdivision (a) only if both of the following conditions are satisfied:

- (1) The corporation proves the consent by the affected domestic or foreign corporation.
- (2) The Secretary of State finds that, under the circumstances, the public is not likely to be misled.

Comment. Section 14511 is the same in substance as a portion of Section 201(b)(General Corporation Law). This provision is new for nonprofit corporations.

404/937

§ 14512

Substance Tentatively Approved February 1976
Staff Revision and Renumbering April 1976
Renumbered and Staff Addition (subdivision (c))
May 1976

§ 14512. Name which is likely to mislead or contains the word "charitable"

14512. A corporation shall not adopt any of the following:

- (a) A name which is likely to mislead the public.

§ 14512

(b) A name in which the word "charitable" or its equivalent appears unless the corporation is a nonprofit corporation organized for charitable purposes.

(c) A name the use of which is prohibited by any other statute.

Comment. Subdivision (a) of Section 14512 is the same in substance as a portion of Section 201(b) (General Corporation Law). It continues a provision of former Section 310.

Subdivision (b) of Section 14512 is new. It is a specific application of the general rule stated in subdivision (a). A nonprofit corporation that is organized for charitable purposes must so state in its articles (Section 5250) and is subject to Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code (Uniform Supervision of Trustees for Charitable Purposes Act).

Subdivision (c) of Section 14512 is new. It recognizes that there may be other applicable name limitations in other statutes. See, e.g., Section 12950 (use of word "cooperative"); Fin. Code § 5501 (building and loan and savings and loan associations); 36 U.S.C. § 379 (use of words "Olympic" or "Olympiad"). [The Comment will be expanded to list other applicable name limitations in other statutes if any are discovered.]

Note. The staff has not yet investigated the advisability of a grandfather clause for those corporations now existing which might violate subdivision (b) upon its enactment.

043/180

§ 14515
Tentatively Approved February 1976
Staff Revision and Renumbering April 1976
Renumbered May 1976

Article 3. Sanctions for Name Violations

§ 14515. Sanctions for name violations

14515. (a) The Secretary of State shall not file articles which violate the provisions of this chapter.

(b) The use by a corporation of a name in violation of this chapter may be enjoined notwithstanding the filing of its articles by the Secretary of State.

Comment. Section 14515 is comparable to portions of Section 201(b) (General Corporation Law). It continues portions of former Section 310. It should be noted that a nonprofit corporation may not use a name that is deceptively similar to that of a domestic nonprofit association. Law v. Crist, 41 Cal. App.2d 862, 107 P.2d 953 (1941).

CHAPTER 3. FILING OF INSTRUMENTS;
CERTIFICATES OF CORRECTION

Article 1. Application of Chapter

§ 14520. Application of chapter

14520. Unless the particular provision otherwise provides, the provisions of this chapter apply to instruments required or permitted to be filed with the Secretary of State with respect to domestic and foreign corporations, whether or not filed pursuant to this title.

Comment. Section 14520 makes the provisions of this chapter (unless the particular provision otherwise provides) applicable to all instruments required or permitted to be filed with the Secretary of State. This may broaden the applicability of the provisions of former law.

Note. If it is determined that a definition of "instrument" is necessary or other definitions are necessary, those definitions can be included in this article.

Policy Issue:

Should the policy reflected in this section be adopted? Note that some sections included in this chapter are limited in their application. See Section 14833(c). Staff recommendation: Yes.

Article 2. Filing of Instruments§ 14530. Filing by Secretary of State

14530. (a) Upon receipt of any instrument for filing, the Secretary of State shall, if it conforms to law, file the instrument in the office of the Secretary of State and endorse the date of filing thereon.

(b) The Secretary of State shall file a document as of any requested future date, not more than 180 days after its receipt, including a Saturday, Sunday, or legal holiday, if the document is received in the Secretary of State's office at least one business day prior to the requested date of filing.

(c) The date of filing is the date the instrument is received by the Secretary of State unless withheld from filing for a period of time pursuant to a request by the party submitting it for filing or unless in the judgment of the Secretary of State the filing is intended to be coordinated with the filing of some other corporate document which cannot be filed. In the case of an instrument resubmitted for filing pursuant to Section 14533, the date of filing is the date the instrument was first received by the Secretary of State.

Comment. Section 14530 is the same in substance as Section 110(a) (General Corporation Law). The last sentence is new.

Note. The staff has not yet developed a definition of "instrument" or distinguished between "instruments" (subdivisions (a) and (c)) and "documents" (subdivisions (b) and (c)).

The staff will follow the proposed amendment to Section 110(a) in Assembly Bill 2849. These amendments have been included in Section 14530.

Note. The enactment of this article permits the repeal of Sections 108 and 110.

043/199

§ 14531

Tentatively Approved January 1976

Staff Revision and Renumbering April 1976

Renumbered May 1976

§ 14531. Delayed effective date of instruments

14531. (a) Any instrument filed with respect to a corporation (other than original articles) may specify that the instrument is to become effective on a date not later than 90 days after the filing date.

(b) If no revocation certificate is filed, the instrument becomes effective on the date specified.

Comment. Section 14531 is the same in substance as portions of Section 110(c) (General Corporation Law).

404/933

§ 14532

Not Approved; See Minutes January 1976

Staff Revision and Renumbering April 1976

Renumbered May 1976

§ 14532. Revocation certificates

14532. (a) An instrument filed with a delayed effective date may be prevented from becoming effective by a revocation certificate filed on or before the specified effective date.

(b) The revocation certificate shall state that, by appropriate corporate action, the instrument has been revoked and is null and void.

(c) The revocation certificate shall be executed in the same manner as the original instrument except that, in the case of an agreement of merger or consolidation, the certificate need only be executed on behalf of one of the constituent corporations.

§ 14533

Comment. Section 14532 is the same in substance as portions of Section 110(c) (General Corporation Law).

Note. The staff has yet to check with the Secretary of State concerning the meaning of the phrase "by appropriate corporate action."

968/612

§ 14533

Tentatively Approved January 1976

Staff Revision and Renumbering April 1976

Renumbered May 1976

§ 14533. Instruments conforming to law

14533. (a) If the Secretary of State determines that an instrument submitted for filing or otherwise submitted does not conform to law, the Secretary of State may return the instrument to the person submitting it. An instrument does not fail to conform to law because it is not accompanied by the full filing fee if the unpaid portion of the fee does not exceed the limits established by the policy of the Secretary of State for extending credit in such cases.

(b) An instrument returned pursuant to subdivision (a) may be resubmitted accompanied by a written opinion of the member of the State Bar of California submitting the instrument, or representing the person submitting it, to the effect that the specific provision of the instrument objected to by the Secretary of State does conform to law and stating the points and authorities upon which the opinion is based.

(c) If the instrument is submitted pursuant to Division 1 (commencing with Section 100), Division 2 (commencing with Section 5000), or Division 3 (commencing with Section ____), the Secretary of State shall

§ 14534

rely, with respect to any disputed point of law (other than the applica-
tion of Chapter 2 (commencing with Section 14500), or Article 3 (commencing
with Section 14875) of Chapter 9, and [other reference to sections
relating to corporate names]), upon a written opinion pursuant to sub-
division (b) in determining whether the instrument conforms to law.

Comment. Section 14533 is the same in substance as portions of
Section 110(b), (c).

Note. The references in subdivision (c) are to corporate name pro-
visions and will be completed when those provisions have been drafted.
Note that subdivision (c) applies to Division 3, as well as Divisions 1
and 2. This will require a careful review of the provisions in Division
3 to make sure any exceptions relating to corporate name are included.

406/002

§ 14534

Staff Draft April 1976
Renumbered May 1976

§ 14534. Filing fees

14534. The fees of the Secretary of State for filing instruments
by or on behalf of corporations are prescribed in Article 3 (commencing
with Section 12180) of Chapter 3 of Part 2 of Division 3 of Title 2 of
the Government Code.

Comment. Section 14534 is the same in substance as former Section
124.

Note. The staff has not yet investigated whether there will be a
need for amendments to the Government Code fee provisions.

Note. The enactment of this section permits the repeal of Section
108.

968/652

§ 14535

Tentatively Approved March 1976

Staff Revision and Renumbering April 1976

Renumbered May 1976

Article 3. Certificates of Correction

§ 14535. Correction of instruments

14535. An agreement, certificate, or other instrument relating to a corporation may be corrected with respect to a misstatement of fact contained therein, a defect in the execution thereof, or any other error or defect contained therein by filing a certificate of correction.

Comment. Article 3 (commencing with Section 14535) is the same in substance as Section 109 (General Corporation Law) but may have broader application. See Section 14520. Article 3 continues provisions of former Section 127.

Note. The enactment of this article permits the repeal of Section 109.

968/667

§ 14536

Tentatively Approved March 1976

Staff Revision and Renumbering April 1976

Renumbered May 1976

§ 14536. Contents of certificate of correction

14536. The certificate of correction shall be entitled "Certificate of Correction of _____ (insert here the title of the agreement, certificate, or other instrument to be corrected and name(s) of corporation or corporations)" and shall set forth the following:

(a) The name or names of the corporation or corporations.

(b) The date the agreement, certificate, or other instrument being corrected was filed.

(c) The provision in the agreement, certificate, or other instrument as corrected and, if the execution was defective, wherein it was defective.

Comment. See Comment to Section 14535.

968/668 § 14537
Tentatively Approved March 1976
Staff Revision and Renumbering April 1976
Renumbered May 1976

§ 14537. Execution of certificate of correction

14537. The certificate of correction shall be signed and verified or acknowledged as provided in the applicable statute with respect to the agreement, certificate, or other instrument being corrected.

Comment. See Comment to Section 14535.

Note. This section will need to be reviewed if the scope of this article is expanded to cover instruments executed pursuant to sections in other codes by corporations incorporated under the Corporations Code provisions or incorporated under statutes compiled in other codes. This review can take place when these other statutes are reviewed to conform them to Division 1 or Division 2.

968/669 § 14538
Tentatively Approved March 1976
Staff Revision and Renumbering April 1976
Renumbered May 1976

§ 14538. Limitations on certificate of correction

14538. (a) No certificate of correction shall alter the wording of any resolution which was in fact adopted by the board or the shareholders or members.

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(b) No certificate of correction shall effect a corrected amendment of articles which amendment as so corrected would not in all respects have complied with the statutory requirements in effect at the time of filing of the agreement, certificate, or other instrument being corrected.

Comment. See Comment to Section 14535.

Note. Subdivision (b) is to be reviewed for need and for clarity.

968/670

§ 14539

Tentatively Approved March 1976

Renumbered April 1976

Renumbered May 1976

§ 14539. Effective date of corrected instrument unaffected by filing certificate of correction

14539. The filing of the certificate of correction shall not alter the effective date of the agreement, certificate, or other instrument being corrected, which shall remain as its original effective date.

Comment. See Comment to Section 14535.

968/671

§ 14540

Tentatively Approved March 1976

Renumbered April 1976

Renumbered May 1976

§ 14540. Rights and liabilities affected by filing certificate of correction

14540. The filing of the certificate of correction does not affect any right or liability accrued or incurred before the filing except that any right or liability accrued or incurred by reason of the error or

defect being corrected is extinguished by the filing if the person having the right has not detrimentally relied on the original instrument.

Comment. See Comment to Section 14535.

Note. The staff has not yet investigated the problem of notice to persons who might have relied on the incorrect instrument.

Article 4. Record of Process Served on Secretary
of State

§ 14545. Record of process served on Secretary of State

14545. (a) The Secretary of State shall keep a record of all process served upon the Secretary of State and shall record therein the time of service and the Secretary of State's action with respect thereto.

(b) The certificate of the Secretary of State, under the Secretary of State's official seal, certifying to the receipt of process, the giving of notice thereof to the corporation, and the forwarding of such process as prescribed by law, shall be competent and prima facie evidence of the matters stated therein.

Comment. Section 14545 is the same in substance as subdivision (c) of Section 1702, subdivision (c) of Section 2110, and all of the last paragraph of former Section 6408 except the first sentence (this paragraph having been omitted in the new General Corporation Law), except that Section 14545 applies to nonprofit corporations as well as to business corporations. See Section 14450.

CHAPTER 4. SERVICE OF PROCESS ON DOMESTIC
 CORPORATIONS

Article 1. Manner of Service Generally

§ 14550. Additional method for serving domestic corporation

14550. In addition to the provisions of Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure, process may be served upon a domestic corporation as provided in this chapter.

Comment. Chapter 4 (commencing with Section 14550) is the same in substance as Sections 1700-1702 of the Corporations Code. (Subdivision (c) of Section 1702 is compiled in Section 14545.) The phrase "personal delivery" has been substituted in this chapter for "delivery by hand" to which appears in Sections 1701 and 1702 to conform the terminology to that used in the Code of Civil Procedure. See Code Civ. Proc. §§ 415.10 and 415.20. Section 1702, as proposed to be amended by Assembly Bill 2849 of the 1975-76 Regular Session, has been used in preparing this chapter. The following table shows the source of each section in this chapter.

<u>Section</u>	<u>Source (Corp. Code Sections)</u>
14550	1700
14560	1701
14570	1702(a)
14571	1702(b)(first two sentences)

Note. The enactment of this chapter and Section 14545 would permit repeal of Sections 1700, 1701, and 1702.

405/935

§ 14560

Tentatively Approved April 1976

Staff Revision and Renumbering April 1976

Renumbered May 1976

Article 2. Service on Designated Agent

§ 14560. Service on designated agent for service

14560. Personal delivery of a copy of any process against the corporation (a) to any natural person designated by it as agent or (b), if a corporate agent has been designated, to any person named in the latest certificate of the corporate agent filed pursuant to Section 1505 at the office of such corporate agent shall constitute valid service on the corporation.

Comment. See the Comment to Section 14550.

405/934

§ 14570.

Tentatively Approved April 1976

Staff Revision and Renumbering April 1976

Renumbered May 1976

Article 3. Service on Secretary of State

§ 14570. Service on Secretary of State

§ 14570. If an agent for the purpose of service of process has resigned and has not been replaced or if the agent designated cannot with reasonable diligence be found at the address designated for personal delivery of the process, and it is shown by affidavit to the satisfaction of the court that process against a domestic corporation cannot be served with reasonable diligence upon the designated agent by personal delivery in the manner provided in Section 415.10, subdivision (a) of Section 415.20 or subdivision (a) of Section 415.30 of the Code of Civil Procedure or upon the corporation in the manner provided in subdivision (a), (b), or (c) of Section 416.10 or subdivision (a) of Section 416.20 of the Code of Civil Procedure, the court may make an order that the service be made upon the corporation by personal delivery to the Secretary of State, or to any person employed in the Secretary of State's office in the capacity of assistant or deputy, one copy of the process for each defendant to be served, together with a copy of the order authorizing such service. Service in this manner is deemed complete on the 10th day after delivery of the process to the Secretary of State.

Comment. See the Comment to Section 14550.

406/174

§ 14571

Tentatively Approved April 1976

Staff Revision and Renumbering April 1976

Renumbered May 1976

§ 14571. Notice to corporation

14571. (a) Upon the receipt of any such copy of process and the fee therefor, the Secretary of State shall give notice of the service of the process to the corporation by:

(1) Forwarding to the corporation at its principal executive office by registered or certified mail, with request for return receipt, the copy of the process; or

(2) If the records of the Secretary of State do not disclose an address for the company's principal executive office, forwarding such copy in the same manner to the last designated agent for service of process who has not resigned.

(b) If the agent for service of process has resigned and has not been replaced and the records of the Secretary of State do not disclose an address for the company's principal executive office, no action need be taken by the Secretary of State.

Comment. See the Comment to Section 14550.

Cross-Reference:

Record of process served on Secretary of State § 14545

Policy Issue:

Should the Secretary of State be required to send a copy of the process both to the corporation at its principal executive office and to its last designated agent for service of process? Staff recommendation: Yes.

406/466

§ 14600

Tentatively Approved April 1976

Renumbered and Revised May 1976

CHAPTER. 5. STATEMENT IDENTIFYING OFFICERS, OFFICE, AND
AGENT FOR SERVICE

Comment. The enactment of this chapter permits the repeal of Sections 1502, 1503, 1504, and 1505 (General Corporation Law).

§ 14600. Applicable filing period defined

14600. For the purposes of this chapter, the applicable filing period for a corporation is the calendar month during which its original articles were filed and the immediately five preceding calendar months.

Comment. Section 14000 is the same in substance as the first sentence of Section 1502(c) as amended by Chapter ___ of the Statutes of 1976.

404/298

§ 14601

Staff Draft May 1976

§ 14601. Statement identifying directors, officers, and offices

14601. (a) Except as provided in Section 14602, within 90 days after the filing of its original articles and each year thereafter during the applicable filing period, every corporation shall file, on a form prescribed by the Secretary of State, a statement containing all of the following:

- (1) The presently authorized number of its directors.
- (2) The name and complete business or residence address of each of its incumbent directors.
- (3) The name and complete business or residence address of its chief executive officer, secretary, and chief financial officer.

§ 14602

(4) The street address of its principal executive office.

(5) If the address of its principal executive office is not in this state, the street address of its principal business office, in this state, if any.

(6) A statement of the general type of business which constitutes the principal business activity of the corporation (for example, manufacturer of aircraft; wholesale liquor distributor; retail department store).

(b) Whenever any of the information required by subdivision (a) is changed, the corporation may file a current statement containing all of the information required by subdivision (a) and Section 14603.

Comment. Section 14601 continues without substantive change subdivision (a) and the first sentence of subdivision (d) of Section 1502 (General Corporation Law) but extends the requirement to all corporations (other than nonprofit corporations) whether or not Division 1 (commencing with Section 100) applies to the corporation. In this respect, Section 14601 continues the requirement of former Section 3301 that all corporations (see former Section 119) file an annual statement unless otherwise excepted from the requirement.

The fee for filing the statement is prescribed in Government Code Section 12210.

406/467

§ 14602

Tentatively Approved April 1976
Renumbered May 1976

§ 14602. Statement required of nonprofit corporation

14602. (a) Within 90 days after the filing of its original articles and every five years thereafter during the applicable filing period, every nonprofit corporation shall file, on a form prescribed by the Secretary of State, a statement containing all of the following:

§ 14602

(1) The name and complete business or residence address of its chief executive officer.

(2) The street address of its principal executive office.

(3) If the address of its principal executive office is not in this state, the street address of its principal office in this state, if any.

(b) Whenever any of the information required by subdivision (a) changes, the nonprofit corporation shall, not later than 30 days after such change, file a current statement containing all of the information required by subdivision (a) and by Section 14603.

(c) Nothing in this section prevents a nonprofit corporation from filing a statement under this chapter more frequently than every fifth year.

Comment. Section 14602 is based on former Section 3301 which required a filing only once every five years for nonprofit corporations. Compare Section 14601 which requires an annual filing for other corporations. Unlike former Section 3301, which required the statement to list the name and address of the president, vice president, secretary, and treasurer of the nonprofit corporation, Section 14602 requires only the name and address of the chief executive officer of the nonprofit corporation.

Subdivision (b) requires that the nonprofit corporation file a new statement within 30 days of a change of any in the information required by subdivision (a). Under former Section 3301, a nonprofit corporation was required to file a new statement every time there was any change in officers.

Subdivision (c) makes clear that the nonprofit corporation may file a new statement at any time even though there is no change in the information required by subdivision (a).

The fee for filing the statement is prescribed in Government Code Section 12210 [to be amended to apply to all corporations].

§ 14603

Note. Former Section 3301 (last paragraph) contains a definition of "nonprofit corporation" that may include some nonprofit corporations that will not be covered by the new statute. This matter will need² to be reviewed when the scope of the statute has been determined and a broader definition of "nonprofit corporation" provided here so that the scope of the existing statute will be retained.

406/468

§ 14603

Tentatively Approved April 1976

Renumbered and Revised May 1976

§ 14603. Designation of agent for service

14603. The statement required by Section 14601 or 14602 shall also designate, as the agent of the corporation for the purpose of service of process, any natural person residing in this state or a corporation which has complied with Section 14611 and whose capacity to act as such agent has not terminated. If a natural person is designated, the statement shall set forth such person's complete business or residence address. If a corporate agent is designated, no address for it shall be set forth.

Comment. Section 14603 is the same in substance as Section 1502(b) (General Corporation Law). Unlike former Section 3301(a), the designation of an agent for service for all corporations--including nonprofit corporations--is mandatory rather than permissive. One of the changes made by the new General Corporation Law is that the designation of an agent for service for corporations under that law is now mandatory; formerly, designation of an agent for service was permissive under former Section 3301(a).

968/639

§14604

Tentatively Approved April 1976
Renumbered and Revised May 1976

§ 14604. Change of agent for service or agent's address

14604. In order to change its agent for service of process or the address of the agent, the corporation shall file a current statement containing all the information required by Section 14603 and by Section 14601 of 14602; whichever applies.

Comment. Section 14604 is the same in substance as the second sentence of Section 1502(d) (General Corporation Law).

986/640

§ 14605

Tentatively Approved April 1976
Renumbered May 1976

§ 14605. Statement of resignation as agent; notice to corporation

14605. An agent designated for service of process pursuant to Section 14603 or 14866 or 14868, may file a signed and acknowledged written statement of resignation as such agent. Thereupon, the authority of the agent to act in such capacity shall cease and the Secretary of State forthwith shall give written notice of the filing of the statement of resignation by mail to the corporation addressed to its principal executive office.

Comment. Section 14605 is the same in substance as Section 1503 (General Corporation Law).

968/641

§ 14606

Tentatively Approved April 1976
Renumbered May 1976

§ 14606. When designation of new agent required

14606. If a natural person who has been designated agent for service of process pursuant to Section 14603 or 14866 or 14868 dies, is adjudicated incompetent, or resigns or no longer resides in the state or if the corporate agent for such purpose resigns, dissolves, withdraws from the state, forfeits its right to transact intrastate business, has its corporate rights, powers, and privileges suspended, or ceases to exist, the corporation shall, upon notice of such fact, forthwith file a designation of a new agent conforming to the requirements of Section 14603 or 14868.

Comment. Section 14606 is the same in substance as Section 1504 (General Corporation Law) except that the phrases "is adjudicated incompetent" and "upon notice of such fact" have been added.

968/642

§ 14607

Not Approved

Renumbered May 1976

§ 14607. Renewal forms

14607. The Secretary of State shall mail a form for compliance with this chapter to each corporation approximately three months prior to the close of the applicable filing period. The form shall state the due date of the statement and shall be mailed to the last address of the

corporation according to the records of the Secretary of State. Neither the failure of the Secretary of State to mail the form nor the failure of the corporation to receive it is an excuse for failure to comply with this chapter.

Comment. Section 14607 is the same in substance as the last three sentences of Section 1502(c).

Note. This section should codify existing practice. The office of the Secretary of State should be contacted to determine existing practice. The cost of sending renewal statements annually as contrasted with every five years should be obtained from the office of the Secretary of State. The views of the office of the Secretary of State whether renewal forms should be sent annually even though, in the case of a nonprofit corporation, the statement is required to be filed only once every five years should be obtained.

968/643

§ 14608

Tentatively Approved April 1976
Renumbered May 1976

§ 14608. New statement supersedes previous statement; disposal of superseded statement

14608. (a) Whenever the corporation files a statement pursuant to this chapter, it supersedes any previously filed statement and any statement in its articles as to the agent for service of process and the address of the agent.

(b) The Secretary of State may destroy or otherwise dispose of any statement filed pursuant to this chapter after it has been superseded by the filing of a new statement.

Comment. Subdivision (a) of Section 14608 is the same in substance as the last sentence of Section 1502(d)(General Corporation Law); subdivision (b) is the same in substance as Section 1502(e)(General Corporation Law).

968/644

§14609

Tentatively Approved April 1976
Renumbered May 1976

§ 14609. Statement not construed as notice

14609. This chapter shall not be construed to place any person dealing with the corporation on notice of, or under any duty to inquire about, the existence or content of any statement filed pursuant to this chapter.

Comment. Section 14609 is the same in substance as Section 1502(f) (General Corporation Law).

968/695

§ 14610

Not Approved
Renumbered May 1976

§ 14610. Procedure upon failure to file statement

14610. (a) Upon the failure of a corporation to file the statement required by this chapter, the Secretary of State shall mail a notice of such delinquency to the corporation. The notice shall also contain information concerning the application of this chapter and advise the corporation of the penalty imposed by Section 25936 of the Revenue and Taxation Code for failure to timely file the required statement after notice of delinquency has been mailed by the Secretary of State. If, within 60 days after the mailing of the notice of delinquency, a statement pursuant to this chapter has not been filed by the corporation, the Secretary of State shall certify the name of such corporation to the Franchise Tax Board.

(b) Upon certification pursuant to subdivision (a), the Franchise Tax Board shall assess against the corporation a penalty of two hundred fifty dollars (\$250) pursuant to Section 25936 of the Revenue and Taxation Code.

(c) The penalty herein provided shall not apply to a corporation which on or prior to the date of certification pursuant to subdivision (a) has dissolved or has been merged into another corporation.

(d) The penalty herein provided shall not apply and the Secretary of State need not mail a notice of delinquency to a corporation the corporate powers, rights, and privileges of which have been suspended by the Franchise Tax Board pursuant to Section 23301, 23001.5, or 23775 of the Revenue and Taxation Code on or prior to, and remain suspended on, the last day of the filing period pursuant to this chapter. The Secretary of State need not mail a form pursuant to Section 14607 to a corporation the corporate powers, rights, and privileges of which have been so suspended by the Franchise Tax Board on or prior to, and remain suspended on, the day the Secretary of State prepares the forms for mailing.

(e) If, after certification pursuant to subdivision (a) the Secretary of State finds the required statement was filed before the expiration of the 60-day period after mailing of the notice of delinquency, the Secretary of State shall promptly decertify the name of the corporation to the Franchise Tax Board. The Franchise Tax Board shall then promptly abate any penalty assessed against the corporation pursuant to Section 25936 of the Revenue and Taxation Code.

Comment. Section 14610 is the same in substance as Section 2204 (General Corporation Law) as amended by Chapter ___ of the Statutes of 1976. The imposition of a monetary penalty for the failure to file the required statement replaces the sanction of suspension of corporate, power, rights, and privileges contained in former Section 3301.1.

Note. This section was discussed but not approved. The views of the office of the Secretary of State should be solicited whether the system provided by this section is as simple and as effective as it might be. The Commission believes that the section is unduly complicated and that it will not accomplish the purpose it seeks to accomplish. If the procedure provided by the section is not considered appropriate and desirable by the office of the Secretary of State, the views of the office of the Secretary of State as to an appropriate procedure should be requested. It would also be appropriate to obtain the views of the Franchise Tax Board on the desirability of this section.

404/299

§ 14611

Staff Draft May 1976

§ 14611. Qualification of corporation as agent for service

14611. (a) Any corporation, before it may be designated as the agent for the purpose of service of process of any corporation pursuant to Section 14603 or 14866 or 14868, shall file a certificate executed in the name of the corporation by an officer thereof stating:

(1) The complete address of its office or offices in this state, wherein any corporation designating it as such agent may be served with process.

(2) The name of each person employed by it at each such office to whom it authorizes the delivery of a copy of any such process.

(3) Its consent that delivery thereof to any such person at the office where such person is employed shall constitute delivery of any such copy to it, as such agent.

§ 14611

(b) Any corporation which has filed the certificate provided for in subdivision (a) may file any number of supplemental certificates containing all the statements provided for in subdivision (a), which, upon the filing thereof, shall supersede the statements contained in the original or in any supplemental certificate previously filed.

(c) No domestic or foreign corporation may file a certificate pursuant to this section unless it is currently authorized to engage in business in this state and is in good standing on the records of the Secretary of State.

Comment. Section 14611 is the same in substance as Section 1505 (General Corporation Law).

405/479

CHAPTER 6. [RESERVED]

CHAPTER 7. [RESERVED]

CHAPTER 8. [RESERVED]

See Memorandum 76-66

CHAPTER 9. FOREIGN CORPORATIONS

Comment. Chapter 9 continues the substance of provisions of Chapter 21 of the General Corporation Law and makes those provisions applicable to all foreign corporations (see Section 14860), profit or non² profit, stock or nonstock, now existing or hereafter formed, unless the corporation is expressly excepted from the operation thereof or there is a special provision applicable to the corporation inconsistent with some provision of the chapter, in which case the special provision prevails. See Section 14450.

The source of each section in this chapter is given in the Comment to the section. The enactment of this chapter permits the repeal of the comparable provisions of the General Corporation Law but would not permit the repeal of the provisions of the General Corporation Law relating to pseudo-foreign corporations (Sections 2108, 2109, and 2115). The pseudo-foreign corporations provisions will remain in the General Corporation Law. The disposition of the sections in Chapter 21 of the General Corporation Law in this chapter is shown in the table below.

<u>General Corporation Law Section</u>	<u>Disposition (new Division 4)</u>
2100	14860
2101	14878
2102	14866(d)
2103	14861
2104	14862
2105 - first sentence.	14865
- remainder of section.	14866
2106 - subdivision (a)	14867
- subdivision (b)--portion of first sentence.	14875
- subdivision (b)--clause (1) first sentence.	14876
- subdivision (b)--remainder of subdivision	14877
2107	14868
2108 (continued in General Corporation Law)	
2109 (as amended in AB 2849--continued in General Corporation Law)	
2110	14881

2111 - subdivision (a)	14882
- subdivision (b)	14883
- subdivision (c)	14545
2112	14869
2113	14870
2114	14885
2115 (continued in General Corporation Law)	
2116	14863

Staff Draft May 1976

Article 1. General Provisions§ 14860. Application of chapter

14860. This chapter applies only to foreign corporations trans-acting intrastate business except as otherwise expressly provided.

Comment. Section 14860 is the same in substance as Section 2100 (General Corporation Law) except that this chapter applies to nonprofit corporations as well as business corporations. See Section 14450.

404/139

§ 14861

Staff Draft May 1976

§ 14861. Foreign insurers

14861. (a) Nothing in this chapter prevents any foreign insurance company from carrying out contracts made before the surrender of its right to engage in intrastate business or contracts made with citizens of other states who subsequently become citizens of or residents in this state.

(b) Nothing in this chapter repeals, alters, or amends the provisions of Sections 1600 to 1605, inclusive, of the Insurance Code.

Comment. Section 14861 is the same in substance as Section 2103 (General Corporation Law). The reference in Section 2103 to "Sections 1600 to 1607, inclusive" has been changed in Section 14861 to refer to "Sections 1600 to 1605, inclusive" to reflect the fact that Sections 1606 and 1607 of the Insurance Code were repealed in 1970. See Cal. Stats. 1970, Ch. 1708, §§ 3, 4. Sections 1600-1605 relate to designation of agent for service of process by a foreign insurer.

Note. Should the word "corporation" be substituted for "company" in subdivision (a) of Section 14861?

Staff Draft May 1976

§ 14862. Foreign lending institutions

14862. (a) A foreign lending institution which has not qualified to do business in this state and which engages in any of the activities set forth in subdivision (d) of Section 14852 shall be considered by such activities to have appointed the Secretary of State as its agent for service of process for any action arising out of any such activities and, on or before June 30th of each year, shall file a statement showing the address to which any notice or process may be sent in the manner and with the effect provided in Sections 14882 and 14883.

(b) No foreign lending institution solely by reason of engaging in one or more of the activities set forth in subdivision (d) of Section 14852 shall be required to qualify to do business in this state nor be subject to:

(1) Any of the provisions of the Bank and Corporation Tax Law (commencing with Section 23001) of the Revenue and Taxation Code; or

(2) Any of the provisions of the Corporations Code, Financial Code, or Insurance Code relating to qualifications for doing or transacting business in this state or to requirements pertaining thereto or to the effects or results of failure to qualify to do business in this state.

Comment. Section 14862 is the same in substance as Section 2104 (General Corporation Law) as amended by Chapter ___ of the Statutes of 1976. The definition of "foreign lending institution" provided by Section ___ applies to Section 14862. This appears to be the effect of prior law although it was not clear that the definitional language found in the first portion of subdivision (d) of Section 191 applied to the term "foreign lending institution" as used in Section 2104.

Staff Draft May 1976

§ 14863. Liability of directors

14863. The directors of a foreign corporation transacting intrastate business are liable to the corporation, its shareholders or members, creditors, receiver, liquidator or trustee in bankruptcy for the making of unauthorized dividends, purchase of shares or memberships, distribution of assets, or false certificates, reports, or public notices or other violation of official duty according to any applicable laws of the state or place of incorporation or organization, whether committed or done in this state or elsewhere. Such liability may be enforced in the courts of this state.

Comment. Section 14863 is the same in substance as Section 2116 (General Corporation Law) except that reference has been included to "members" and "memberships" since Section 14863 applies to nonprofit corporations as well as to business corporations. See Section 14450.

Staff Draft May 1976

Article 2. Qualification to Transact Intrastate Business§ 14865. Certification of qualification required

14865. A foreign corporation shall not transact intrastate business in this state without having first obtained from the Secretary of State a certificate of qualification.

Comment. Section 14865 is the same as the first sentence of Section 2105 (General Corporation Law) except that Section 14865 applies to nonprofit corporations as well as to business corporations. See Section 14850.

Staff Draft May 1976

§ 14866. Filing statement and designation

14866. (a) To obtain a certificate of qualification, the foreign corporation shall fill, on a form prescribed by the Secretary of State, a statement and designation signed by a corporate officer stating:

(1) Its name and the state or place of its incorporation or organization.

(2) The address of its principal executive office.

(3) The address of its principal office within this state.

(4) The name of an agent upon whom process directed to the corporation may be served within this state. Such designation shall comply with the provisions of Section 14603.

(5) Its irrevocable consent to service of process directed to it upon the agent designated and to service of process on the Secretary of State if the agent so designated or the agent's successor is no longer authorized to act or cannot be found at the address given.

(b) Annexed to such statement and designation shall be a certificate by an authorized public official of the state or place of incorporation of the corporation to the effect that such corporation is an existing corporation in good standing in that state or place or, in the case of an association, an officers' certificate stating that it is a validly organized and existing business association under the laws of a specified foreign jurisdiction.

(c) Before it may be designated by any foreign corporation as its agent for service of process, any corporate agent must comply with Section 14611.

(d) A foreign corporation which has filed a designation of an agent for service of process, pursuant to the requirements of any law relating to the qualification of foreign corporations in force at the time of the filing, need not file the statement provided for in this section but shall file an amended statement and designation when required by Section 14868.

Comment. Subdivisions (a), (b), and (c) of Section 14866 are the same in substance as Section 2105 (General Corporation Law) except that the first section of Section 2105 is compiled in Section 14865 and Section 14866 applies to nonprofit corporations as well as to business corporations. See Section 14850. Subdivision (d) of Section 14866 is the same in substance as Section 2102 (General Corporation Law) except that the subdivision applies to nonprofit corporations as well as to business corporations.

Staff Draft May 1976

§ 14867. Issuance of certificate

14867. Subject to the provisions of Article 4 (commencing with Section 14875), upon payment of the fees required by law, the Secretary of State shall file the statement and designation prescribed in Section 14866 and shall issue to the corporation a certification of qualification stating the date of filing of the statement and designation and that the corporation is qualified to transact intrastate business, subject, however, to any licensing requirements otherwise imposed by the laws of this state.

Comment. Section 14867 is the same in substance as subdivision (a) of Section 2106 (General Corporation Law) except that Section 14867 applies to nonprofit corporations as well as to business corporations. See Section 14850. See also Govt. Code § 12204 (fees for filing statement and designation).

Staff Draft May 1976

§ 14867. Amended statement and designation; when required

14868. (a) If a foreign corporation qualified to transact intrastate business changes its name, the address of its principal office in this state, the address of its principal executive office, or its agent for service of process, or if the stated address of any natural person designated as agent is changed, the foreign corporation shall file, on a

form prescribed by the Secretary of State, an amended statement and designation signed by a corporate officer setting forth the change or changes made. In the case of a change of name, the amended statement and designation shall set forth the name relinquished as well as the new name assumed and there shall be annexed to the amended statement and designation a certificate of an authorized public official of its state or place of incorporation that such change of name was made in accordance with the laws of that state or place or, in the case of a foreign association, an officers' certificate stating that such change of name was made in accordance with its declaration of trust.

(b) If the change includes a change of name, or a change affecting an assumed name pursuant to Section 14877, upon the filing of the amended statement and designation, the Secretary of State shall issue a new certificate of qualification.

Comment. Section 14868 is the same in substance as Section 2107 (General Corporation Law) except that Section 14868 applies to nonprofit corporations as well as business corporations. See Section 14850.

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§ 14869

Staff Draft May 1976

§ 14869. Surrender of right to transact intrastate business

14869. Subject to Section 14870, a foreign corporation which has qualified to transact intrastate business may surrender its right to transact intrastate business in this state by filing a certificate of surrender signed by a corporate officer stating:

(a) The name of the corporation as shown on the records of the Secretary of State; and the state or place of incorporation or organization.

(b) That it revokes its designation of agent for service of process.

(c) That it surrenders its right to transact intrastate business.

(d) That it consents that process against it in any action upon any liability or obligation incurred within this state prior to the filing of the certificate of surrender may be served upon the Secretary of State.

(e) A post office address to which the Secretary of State may mail a copy of any process against the corporation that is served upon the Secretary of State, which address or the name to which the process should be sent may be changed from time to time by filing a statement signed by a corporate officer stating the new address or name or both.

Comment. Section 14869 is the same in substance as Section 2112 (General Corporation Law).

406/203

§ 14870

Staff Draft May 1976

§ 14870. Merger or consolidation; surrender of right to transact intrastate business

14870. (a) The filing by the Secretary of State of an agreement of merger pursuant to Section 1103 of a foreign disappearing corporation qualified to transact intrastate business in this state, or the filing

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by the Secretary of State pursuant to Section 1110 of a certificate of ownership of a foreign subsidiary corporation qualified to transact

intrastate business in this state, constitutes the surrender by the foreign corporation of its right to engage in such business within this state.

(b) The filing by the Secretary of State pursuant to Section 6154 or 6155 of an agreement of merger or consolidation of a foreign disappearing nonprofit corporation qualified to transact intrastate business

in this state constitutes the surrender by the foreign nonprofit corporation of its right to engage in such business within this state.

(c) If a merger or consolidation does not involve a domestic corporation, each foreign disappearing corporation which has qualified to transact intrastate business in this state shall file a certificate of surrender of such right under Section 14869.

Comment. Subdivision (a) of Section 14870 is the same in substance as Section 2113 (General Corporation Law). Subdivision (b), which is new, is a comparable provision for nonprofit corporations. Subdivision (c) has been included to cover the case where no domestic corporation is involved in the merger or consolidation so there will be no filing in this state of the agreement of merger or consolidation.

REPRODUCED FROM THE ORIGINAL ACTS OF THE LEGISLATURE

§ 14871. Penalty for unauthorized transaction of intrastate business

14871. (a) A foreign corporation which transacts intrastate business and which does not hold a valid certificate of qualification issued by the Secretary of State may be subject to a penalty of twenty dollars (\$20) for each day that such unauthorized intrastate business is transacted.

(b) The penalty established by subdivision (a) shall be assessed according to the number of days it is found that the corporation has been willfully doing unauthorized intrastate business.

(c) Prosecution under this section may be brought, and the money penalty recovered thereby shall be paid, in the manner provided by Section 14907 for a prosecution brought under that section.

Comment. Subdivision (a) of Section 14871 is the same in substance as a portion of Section 2203(a) and a portion of former Section 6408(a).

Subdivisions (b) and (c) of Section 14871 are the same in substance as Section 2203(b) and former Section 6408(b).

Note. Enactment of Sections 14871-14872 and Section 14884 permits the repeal of Section 2203. The portion of Section 2203 relating to consent to jurisdiction has not been continued, this provision being unnecessary in view of Code of Civil Procedure Section 410.10. See the Judicial Council Comment to that section printed under the section in West's Annotated California Codes.

Cross-Reference:

Criminal penalty, § 14907

Staff Draft May 1976

§ 14872. Disability to maintain action upon intrastate business

14872. A foreign corporation subject to the provisions of this chapter which transacts intrastate business without complying therewith shall not maintain any action or proceeding upon any intrastate business so transacted in any court of this state, commenced prior to compliance with this chapter, until the foreign corporation has complied with the provisions thereof and has done all of the following:

(a) Paid to the Secretary of State a penalty of two hundred fifty dollars (\$250) in addition to the fees due for filing the statement and designation required by Section 14866.

(b) Filed with the clerk of the court in which the action is pending receipts showing the payment of such fees and penalty and all franchise taxes and any other taxes on business or property in this state that should have been paid for the period during which it transacted intrastate business.

Comment. Section 14872 is the same in substance as Section 2203(c) and former Section 6801.

Staff Draft May 1976

Article 3. Corporate Name§ 14875. Intrastate business prohibited unless proper corporate name

14875. Except as provided in Sections 14876 and 14877, no foreign corporation having a name which would not be available pursuant to Chapter 2 (commencing with Section 14500) to a new corporation organized in this state shall transact intrastate business in this state or qualify to do so under Article 2 (commencing with Section 14865) or file an amended statement or designation containing such name under that article.

Comment. Section 14875 is the same in substance as a portion of the first sentence of subdivision (b) of Section 2106 (General Corporation Law) except that Section 14875 applies to nonprofit corporations as well as to business corporations. See Section 14450.

Staff Draft May 1976

§ 14876. Exception where use of name by other corporation enjoined

14876. Section 14875 does not apply where the foreign corporation obtains and files an order from a court of competent jurisdiction permanently enjoining the corporation having a conflicting name from doing business in this state under that name.

Comment. Section 14876 is the same in substance as clause (1) of the first sentence of subdivision (b) of Section 2106 (General Corporation Law) except that Section 14876 applies to nonprofit corporations as well as to business corporations. See Section 14450.

Staff Draft May 1976

§ 14877. Exception for foreign corporation making agreement with Secretary of State

14877. Section 14875 does not apply if both of the following conditions are satisfied:

(a) The Secretary of State finds, upon proof by affidavit or otherwise as the Secretary of State may determine, that the business to be conducted in this state by the foreign corporation are not the same as or similar to the business being conducted by the corporation (or to be conducted by the proposed corporation) with whose name it may conflict, and that the public is not likely to be deceived.

(b) The foreign corporation agrees that it will transact business in this state under an assumed name disclosed to the Secretary of State and that it will use such assumed name in all of its dealings with the Secretary of State and in the conduct of its affairs in this state. The assumed name may be the name of the foreign corporation with the addition of some distinguishing word or words acceptable to the Secretary of State, or a name that would be available pursuant to Chapter 2 (commencing with Section 14500) to a new corporation organized in this state at the time of such agreement. A corporation which has made such an agreement with the Secretary of State shall not do business in this state except under the name agreed upon so long as the agreement remains in effect.

Comment. Section 14877 is the same in substance as a portion of subdivision (b) of Section 2106 (General Corporation Law) except that Section 14877 applies to nonprofit as well as to business corporations. See Section 14450.

Staff Draft May 1976

§ 14878. Registration of name by foreign corporation not transacting intrastate business

14878. (a) Any foreign corporation (other than a foreign association) not transacting intrastate business may register its corporate name with the Secretary of State if its corporate name would be available pursuant to Chapter 2 (commencing with Section 14500) to a new corporation organized in this state at the time of such registration.

(b) Registration under this section is made by filing both of the following:

(1) An application for registration signed by a corporate officer stating the name of the foreign corporation, the state or place under the laws of which it is incorporated, the date of its incorporation, and that it desires to register its name under this section.

(2) A certificate of an authorized public official of the state or place in which it is organized stating that the foreign corporation is in good standing under those laws.

(b) The registration is effective until the close of the calendar year in which the application for registration is filed.

(c) A foreign corporation which has in effect a registration of its corporate name may renew such registration from year to year by annually filing an application for renewal setting forth the facts required to be set forth in an original application for registration and a certificate of good standing as required for the original registration between the first day of October and the 31st day of December in each year. The filing of the renewal application extends the registration until the close of the following calendar year.

Comment. Section 14878 is the same in substance as Section 2101 (General Corporation Law) except that Section 14878 applies to nonprofit corporations as well as to business corporations. See Section 14450.

Staff Draft May 1976

Article 4. Service of Process§ 14880. Additional method of service

14880. In addition to the provisions of Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure, process may be served upon a foreign corporation as provided in this article.

Comment. Section 14880 is the same in substance as Section 14850 (service on domestic corporations). The section recognizes that this article supplements the provisions of Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure. See, for example, Code Civ. Proc. §§ 416.10-416.30 (persons upon whom summons may be served), which apply to foreign corporations as well as domestic corporations. See Judicial Council Comments to Sections 416.10, 416.20, and 416.30 under those sections in West's Annotated California Codes. Accordingly, for example, service on a foreign corporation may be made on a person described in Sections 416.10-416.30 or on a person described in Section 14881. Service also may be made under other statutory provisions. E.g., Ins. Code §§ 1600-1605 (service on agent designated by foreign insurer). See Section 14861(b). See also Section 14862 (foreign lending institutions).

Staff Draft May 1976

§ 14881. Service on officer, manager, or agent

14881. Personal delivery of a copy of any process against a foreign corporation (a) to any officer of the corporation or its general

manager in this state, or if the corporation is a bank to a cashier or an assistant cashier, (b) to any natural person designated by it as agent for the service of process, or (c) if the corporation has designated a corporate agent, to any person named in the latest certificate of such corporate agent filed pursuant to Section 14611 constitutes valid service on the corporation. A copy of the statement and designation, certified by the Secretary of State, is sufficient evidence of the appointment of an agent for the service of process.

Comment. Section 14881 is the same in substance as Section 2110 (General Corporation Law) except that Section 14881 applies to nonprofit corporations as well as to business corporations. See Section 14450. The designation of the persons who may be served under Section 14881 is not exclusive. See the Comment to Section 14880. The phrase "personal delivery" has been substituted in this section for "delivery by hand" which appears in Section 2110 to conform to the terminology used in the Code of Civil Procedure. See Code Civ. Proc. §§ 415.10 and 415.20.

968/691

§ 14882

Staff Draft May 1976

§ 14882. Court order for service on Secretary of State

14882. If the agent designated for the service of process is a natural person and cannot with reasonable diligence be found at the address stated in the designation or if such agent is a corporation and no person can with reasonable diligence be found to whom the delivery authorized by Section 14881 may be made for the purpose of delivery to such corporate agent, or if the agent designated is no longer authorized to act, or if no agent has been designated and if no one of the officers

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or agents of the corporation specified in Section 14881 can with reasonable diligence be found and it is so shown by affidavit to the satisfaction of the court, then the court may make an order that service be made by personal delivery to the Secretary of State or to an assistant or deputy secretary of state of two copies of the process together with two copies of the order, except that if the corporation to be served has not filed the statement required to be filed by Section 14866, then only one copy of the process and order need be delivered but the order shall include and set forth an address to which such process shall be sent by the Secretary of State. Service in this manner is deemed complete on the 10th day after delivery of the process to the Secretary of State.

Comment. Section 14882 is the same in substance as subdivision (a) of Section 2111 (General Corporation Law) except that Section 14882 applies to nonprofit corporations as well as to business corporations. See Section 14450. The phrase "with reasonable diligence" has been substituted in Section 14882 for "with due diligence" and "after diligent search" which were used in Section 2111 to conform to the terminology used in Section 14570 (service on domestic corporations) and the service provisions of the Code of Civil Procedure. See, e.g., Code Civ. Proc. § 415.50 and the Judicial Council Comment to that section discussing the meaning of the term "reasonable diligence." See also the Judicial Council Comment to Code of Civil Procedure Section 416.10, indicating that "diligent search" has the same meaning as "with reasonable diligence." Both Judicial Council Comments are printed under the statute sections in the West's Annotated California Codes.

Staff Draft May 1976

§ 14883. Notice to corporation

14883. Upon receipt of the process and order and the fee therefor,

the Secretary of State forthwith shall give notice to the corporation of

the service of the process by forwarding by registered or certified

mail, with request for return receipt, a copy of the process and order

to:

(a) The address specified in the order if the corporation has not

filed the statement required by Section 14866; or

(b) The two offices of the corporation the addresses of which are

set forth in the latest such statement filed.

Comment. Section 14883 is the same in substance as subdivision (b) of Section 2111 (General Corporation Law) except that Section 14883 applies to nonprofit as well as to business corporations. See Section 14450. Where service is made on a corporation that has surrendered its right to transact intrastate business pursuant to Section 14869 or 14870, the address to which process is to be sent is specified in Section 14884(b).

Cross-References:

Foreign lending institution, address to which notice or process to be sent, § 14862

Record of process served on Secretary of State, § 14545

Staff Draft May 1976

§. 14884. Service upon unqualified corporation transacting intrastate business.

14884. A foreign corporation which transacts intrastate business and which does not hold a valid certificate of qualification issued by the Secretary of State may be served with process in the manner provided in this article in any civil action brought in this state wherein the corporation is named a party defendant.

Comment. Section 14884 is based on a portion of Section 2203(a) and former Section 6408(a). The portion of Section 2203(a) relating to consent to jurisdiction has not been continued, this provision being unnecessary in view of Code of Civil Procedure Section 410.10. See the Judicial Council Comment to Section 410.10 printed under the section in West's Annotated California Codes. Unlike former Section 6408, Section 14884 requires that a showing be made of reasonable diligence to serve a corporate officer before a court may order that service be made by personal delivery to the Secretary of State. Also, the former procedure under Section 6408--whereby the plaintiff provided the Secretary of State with the address to which the notice and the process was to be sent--has not been continued; the address to which the Secretary of State sends the notice and process is to be specified in the court order. See Sections 14882 and 14883. The provisions of Section 6408 prescribing the procedure to be followed in making service on the Secretary of State and notifying the corporation were not continued in the new General Corporation Law.

Cross-Reference:

Unqualified corporation, disability to maintain action, § 14872

Staff Draft May 1976

§ 14885. Service upon corporation that has surrendered, forfeited, or withdrawn right to transact intrastate business

14885. (a) A foreign corporation which has transacted intrastate business and has thereafter withdrawn from business in this state may be served with process in the manner provided in this article in any action brought in this state arising out of such business, whether or not it has ever complied with the requirements of this chapter.

(b) A foreign corporation which has surrendered its right to transact intrastate business pursuant to Section 14869 or Section 14870 may be served with process in any action upon a liability or obligation incurred within this state prior to such surrender by delivery of the process to the Secretary of State, or an assistant or a deputy to the Secretary of State pursuant to this article and no court order authorizing such service is required. The process shall be mailed in the manner prescribed in this article except that it shall be sent to the address to which process is authorized to be sent in the certificate of surrender or to the address of the surviving domestic corporation in the case of a surrender under subdivision (a) or (b) of Section 14870.

(c) If a foreign corporation which is qualified to transact intrastate business has its right to transact such business forfeited by the Franchise Tax Board pursuant to the Bank and Corporation Tax Law, Part 11 (commencing with Section 23001) of the Revenue and Taxation Code, or by the Secretary of State pursuant to Section 2108, service of process on such corporation may be effected in the manner set forth in Sections 14881 to 14883, inclusive, as if the right to transact intrastate business had not been forfeited.

§ 14885

(d) The fact that a corporation ceases to transact intrastate business without filing a certificate of surrender does not revoke the appointment of any agent for the service of process.

Comment. Section 14885 is the same in substance as Section 2114 (General Corporation Law) except that Section 14885 applies to nonprofit corporations as well as to business corporations. See Section 14450.

CHAPTER 10. CRIMES

Comment. Chapter 10 continues the substance of provisions of Chapter 22 of the General Corporation Law relating to crimes and makes those provisions applicable to all corporations, profit or nonprofit, stock or nonstock, now existing or hereafter formed, unless the corporation is expressly excepted from the operation thereof or there is a special provision applicable to the corporation inconsistent with some provision of the chapter, in which case the special provision prevails. See Section 14450.

The source of each section in this chapter is given in the Comment to the section. The enactment of this chapter permits the repeal of the comparable provisions of the General Corporation Law. Sections 2200-2204 of the General Corporation Law provide penalties. Sections 2200-2202 would be retained in the General Corporation Law and comparable provisions (except for Section 2201) would be provided in the General Nonprofit Corporation Law. However, these comparable provisions would be compiled in the portion of the General Nonprofit Corporation Law relating to the subject matter to which the particular penalty relates.

The disposition of the sections in Chapter 22 of the General Corporation Law in the staff draft is shown in the table below.

<u>General Corporation Law Section</u>	<u>Disposition (Staff Draft)</u>
2200 (not to be repealed)	6513 (attached to Memorandum 76-64)
2201 (not to be repealed)	No comparable provision
2202 (not to be repealed)	6514 (attached to Memorandum 76-64)
2203	14871 (penalty portion) (jurisdiction portion not continued) 14884 (service portion) 14872 (maintaining action)
2204	14610
2251	14900

2252	14901
2253	14902
2254	14903
2255	14904
2256	14905
2257	14906
2258	14907
2259	14908
2260	14909

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\$ 14900. Fraudulent issuance of shares or memberships

14900. A promoter, director, or officer of a corporation who knowingly and willfully issues or consents to the issuance of shares, memberships, or certificates for shares or memberships in violation of this title with intent to defraud present or future shareholders or members, subscribers, purchasers of shares or memberships, or creditors is guilty of a misdemeanor punishable by a fine of not more than one thousand dollars (\$1,000) or imprisonment for not more than one year or both.

Comment. Section 14900 is the same in substance as Section 2251 and former Section 1308.

Note. Enactment of this section makes possible the repeal of Section 2251.

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§ 14901. Fictitious or fraudulent subscriptions

14901. A person who does any of the following is guilty of a misdemeanor:

(a) Signs the name of a fictitious person to any subscription for or agreement to take stock or a membership in any domestic or foreign corporation, existing or proposed.

(b) Signs to any subscription or agreement the name of any person, knowing:

(1) The person has no means or does not intend in good faith to comply with all the terms thereof; or

(2) There is any understanding or agreement that the terms of the subscription or agreement are not to be complied with or enforced.

Comment. Section 14901 is the same in substance as Section 2252 and former Section 1309.

Note. Enactment of this section makes possible the repeal of Section 2252.

Staff Draft May 1976

§ 14902. Fraudulent payment or distribution

14902. A director of a corporation, domestic or foreign, who concurs in any vote or act of the directors of the corporation or any of them, knowingly and with dishonest or fraudulent purpose, to make any dividend, payment to members or distribution of assets except in the

cases and in the manner allowed by law, either with the design of defrauding creditors, shareholders, or members or of giving a false appearance to the value of the stock or memberships and thereby defrauding subscribers or purchasers, is guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars (\$1,000) or imprisonment for not more than one year or both.

Comment. Section 14902 is the same in substance as Section 2253 and former Section 1511 except as noted below.

Both former Section 1511 and existing Section 7253 limit their application to the directors of "stock corporations," thus excluding the directors of nonprofit corporations which do not issue shares. Section 14902 is not so limited, and it specifically applies to the directors of a nonprofit corporation which issues memberships.

Distributions to shareholders and members are generally regulated by Sections 500-503 and 5236.

Note. Enactment of this section will allow the repeal of Section 2253.

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§ 14903

Staff Draft May 1976

§ 14903. False report or statement; refusal to keep book or post notice

14903. A director, officer, or agent of any corporation, domestic or foreign, is guilty of a felony if he does any of the following:

(a) Knowingly concurs in making, publishing, or posting either generally or privately to the shareholders, members, or other persons:

(1) Any written report, exhibit, statement of its affairs or pecuniary condition, or notice containing any material statement which is false;

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(2) Any untrue or willfully or fraudulently exaggerated report, prospectus, account, or statement of operations, values, business, profits, receipts, expenditures, or prospects; or

(3) Any other paper or document intended to produce or give, or having a tendency to produce or give, the shares of stock or memberships in such corporation a greater value or less apparent or market value than they really possess.

(b) Refuses to make any book entry or post any notice required by law in the manner required by law.

Comment. Section 14903 is comparable to Section 2254 and former Section 3019. The language of Section 2254 has been revised to reflect the inclusion of nonprofit corporations within the scope of Section 14903.

Note. Enactment of Section 14903 will allow the repeal of Section 2254.

966/988

§ 14904

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§ 14904. Fraudulent records

14904. (a) A director, officer, or agent of a corporation, domestic or foreign, who knowingly receives or acquires possession of any property of the corporation, otherwise than in payment of a just demand, and, with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof in the books or accounts of the corporation is guilty of a public offense.

(b) A director, officer, agent, shareholder, or member of a corporation, domestic or foreign, who, with intent to defraud, destroys,

alters, mutilates, or falsifies any of the books, papers, writings, or securities belonging to the corporation or makes or concurs in omitting to make any material entry in any book of accounts or other record or document kept by the corporation is guilty of a public offense.

(c) Each public offense specified in this section is punishable by imprisonment in a state prison for not more than 10 years or by imprisonment in a county jail for not exceeding one year or a fine not exceeding five hundred dollars (\$500) or by both such fine and imprisonment.

Comment. Section 14904 is the same in substance as Section 2255 and former Section 3020.

Note. Enactment of Section 14904 will allow the repeal of Section 2255.

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§ 14905

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§ 14905. Exhibition of false records to public officer

14905. An officer, agent, or clerk of a corporation, domestic or foreign, or a person proposing to organize such a corporation, or to increase the capital stock of any such corporation, or to obtain additional memberships in or contributions to any such corporation, who knowingly exhibits a false, forged, or altered book, paper, voucher, security, or other instrument of evidence to a public officer or board authorized by law to examine the organization of the corporation or to investigate its affairs or to allow an increase of its capital or the sale of additional memberships, with intent to deceive such officer or

§ 14906

board in respect thereto, is punishable by imprisonment in a state ~~prison~~ prison for not more than 10 years or by imprisonment in a county jail for not exceeding one year. ED

Comment. Section 14905 is comparable to Section 2256 and former Section 3021. The language of Section 2256 has been adapted to reflect the broader coverage of Section 14905.

406/221

§ 14906

Staff Draft May 1976

§ 14906. Unauthorized use of names

14906. A person who without authorization subscribes the name of another to or inserts the name of another in any prospectus, circular, or other advertisement or announcement of a corporation, domestic or foreign, whether existing or intended to be formed, with intent to permit the document to be published and thereby to lead persons to believe that the person whose name is so subscribed or inserted is an officer, agent, shareholder, member, or promoter of the corporation, when in fact no such relationship exists to the knowledge of such person, is guilty of a misdemeanor.

Comment. Section 14906 is the same in substance as Section 2257 and former Section 3022.

Note. Enactment of Section 14906 will allow the repeal of Section 2257.

Staff Draft May 1976

§ 14907. Transacting intrastate business without qualification

14907. (a) A foreign corporation subject to the provisions of Chapter 9 (commencing with Section 14850) which transacts intrastate business without complying therewith is guilty of a misdemeanor, punishable by fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000), to be recovered in any court of competent jurisdiction.

(b) Prosecution under this section may be brought by the Attorney General or by any district attorney. If brought by the latter, one-half of the fine collected shall be paid to the treasurer of the county in which the conviction was had and one-half to the State Treasurer. If brought by the Attorney General, the entire amount of fine collected shall be paid to the State Treasurer to the credit of the General Fund of the state.

Comment. Section 14907 is the same in substance as Section 2258 and former Section 6800. The requirement that a foreign corporation obtain a certificate of qualification from the Secretary of State as a prerequisite to transacting intrastate business is set forth in Section 14865. The failure to obtain a certificate of qualification when required may also result in a penalty (Section _____) or an additional misdemeanor (Section 14908).

Note. Enactment of Section 14907 will allow the repeal of Section 2258.

Cross-Reference:

Civil penalty, § 14871

406/223

§ 14908

Staff Draft May 1976

§ 14908. Transacting intrastate business as agent for unauthorized foreign corporation

14908. A person who transacts intrastate business on behalf of a foreign corporation which is not authorized to transact intrastate business in this state, knowing that it is not so authorized, is guilty of a misdemeanor punishable by fine of not less than twenty-five dollars (\$25) nor more than three hundred dollars (\$300).

Comment. Section 14908 is the same in substance as Section 2259 and former Section 6803. Authorization for a foreign corporation to transact intrastate business may be obtained pursuant to Article 3 (commencing with Section 14865) of Chapter 9.

Note. Enactment of Section 14908 will allow the repeal of Section 2259.

406/224

§ 14909

Staff Draft May 1976

§ 14909. Foreign incorporation as defense

14909. In a prosecution for a violation of Section 14901, 14902, 14903, 14904, 14905, or 14906, the fact that the corporation was a foreign corporation is not a defense if it was carrying on business or keeping an office therefor within this state.

Comment. Section 14909 is the same in substance as Section 2260 and former Section 6804.

Note. Enactment of Section 14909 will allow the repeal of Section 2260.

Cross-Reference:

"Business" defined, § _____

404/184

Corp. Code § 9000

Tentatively Approved
February 1976

APPENDIX

DIVISION 2. NONPROFIT CORPORATIONS

PART 1. GENERAL NONPROFIT CORPORATION LAW

CHAPTER 1. GENERAL PROVISIONS

Corporations Code § 9000 (repealed)

9000. This part shall be known and may be cited as the General Nonprofit Corporation Law.

Comment. Former Section 9000 is continued in Section 5000.

404/796

Corp. Code § 9001

Tentatively Approved
February 1976

Corporations Code § 9001 (repealed)

9001. The provisions of this part apply to every nonprofit corporation now existing or hereafter formed, unless the corporation is expressly exempted from the operation thereof, or there is a special provision applicable to the corporation inconsistent with the provisions of this part, in which case the special provision prevails.

Comment. Former Section 9001 is continued in Section 5102.

968/720

Corp. Code § 9002

Tentatively Approved
February 1976

Corporations Code § 9002 (repealed)

9002. The provisions of the General Corporation Law, Division 1 of this title, apply to corporations formed under this part, except as to matters specifically otherwise provided for in this part.

Comment. Former Section 9002 is not continued. The new General Nonprofit Corporation Law, Division 2 (commencing with Section 5000) of Title 17, provides a complete set of rules governing nonprofit corporations and does not incorporate by reference the General Corporation Law. See Section 5102 (scope of division).

Tentatively Approved
February 1976

CHAPTER 2. FORMATION AND BYLAWS

Article 1. Purposes

Corporations Code § 9200 (repealed)

9200. A nonprofit corporation may be formed by three or more persons for any lawful purposes which do not contemplate the distribution of gains, profits, or dividends to the members thereof and for which individuals lawfully may associate themselves, such as religious, charitable, social, educational, or cemetery purposes, or for rendering services, subject to laws and regulations applicable to particular classes of nonprofit corporations or lines of activity. Carrying on business at a profit as an incident to the main purposes of the corporation and the distribution of assets to members on dissolution are not forbidden to nonprofit corporations, but no corporation formed or existing under this part shall distribute any gains, profits, or dividends to any of its members as such except upon dissolution or winding up.

Comment. The portion of the first sentence of former Section 9200 relating to the purposes for which a nonprofit corporation may be formed is superseded by Section 5210; the portion relating to the number of incorporators is superseded by Section 5220.

The portion of the second sentence of former Section 9200 permitting carrying on business at a profit is superseded by Section 5235; the portion precluding distributions to members of gains, profits, or dividends as such is continued in Section 5236(a); the portion permitting distribution of assets on dissolution or winding up is continued in Section 5236(b).

Tentatively Approved
February 1976

Corporations Code § 9201 (repealed)

9201. A nonprofit corporation may be formed under this part for the purposes of defraying or assuming the cost of professional services of licentiates under any chapter of Division 2 (commencing with Section 500) of the Business and Professions Code or of rendering any such services, but it may not engage directly or indirectly in the performance of the corporate purposes or objects unless all of the following requirements are met:

(a) At least one-fourth of all licentiates of the particular profession residing in California become members.

(b) Membership in the corporation and an opportunity to render professional services upon a uniform basis are available to all licensed members of the particular profession.

(c) Voting by proxy and cumulative voting are prohibited.

(d) A certificate is issued to the corporation by the particular professional board whose licentiates have become members, finding compliance with the requirements of subdivisions (a), (b), and (c).

Any such nonprofit corporation shall be subject to supervision by the particular professional board under which its members are licensed and shall also be subject to Section 9505.

Comment. Former Section 9201 is continued in Section 5211.

968/719

Corp. Code § 9201.1

Tentatively Approved
February 1976

Corporations Code § 9201.1 (repealed)

9201.1. Any nonprofit corporation formed under Section 9201 which defrays or assumes some portion or all of the costs of refractions or eye appliances shall offer an equal opportunity to render professional services upon a uniform basis to all licentiates expressly authorized by law to render such services.

Comment. Former Section 9201.1 is continued in Section 5211.

968/718

Corp. Code § 9201.2

Tentatively Approved
February 1976

Corporations Code § 9201.2 (repealed)

9201.2. Nonprofit corporations may be formed under this part for the purposes of administering a system or systems of defraying the cost of professional services of attorneys, but any such corporation may not engage directly or indirectly in the performance of the corporate purposes or objects unless all of the following requirements are met:

(a) The attorneys furnishing professional services pursuant to such system or systems are acting in compliance with the Rules of Professional Conduct of the State Bar of California concerning such system or systems.

(b) Membership in the corporation and an opportunity to render pro-

professional services upon a uniform basis are available to all active members of the State Bar.

(c) Voting by proxy and cumulative voting are prohibited.

(d) A certificate is issued to the corporation by the State Bar of California, finding compliance with the requirements of subdivisions (a), (b) and (c).

Any such nonprofit corporation shall be subject to supervision by the State Bar of California and shall also be subject to Section 9505.

Comment. Former Section 9201.2 is continued in Section 5212.

992/935

Corp. Code § 9202

Tentatively Approved
February 1976

Corporations Code § 9202 (repealed)

9202. A nonprofit corporation may be formed for the purpose of incorporating any existing unincorporated association or organization. As used in this part "unincorporated association" includes but is not limited to society, library, school, college, club, church, trustees of a charitable trust, and chamber of commerce.

Comment. Former Section 9202 is continued in Section 5213.

Tentatively Approved
February 1976

Corporations Code § 9203 (repealed)

9203. A nonprofit corporation may be formed for the purpose of incorporating any subordinate body instituted or created under the authority of any head or national association, lodge, order, beneficial association, fraternal or beneficial society, labor union, foundation, federation, or any other society, organization, or association. The fact that the head or national body is unincorporated does not prevent the incorporation of the subordinate body.

The rules governing the incorporation and operation of unincorporated associations govern the incorporation of any subordinate body.

The seal of the subordinate body shall be its corporate seal.

Comment. Former Section 9203 is continued in Section 5214.

Tentatively Approved
February 1976
Staff revision May 1976

Article 2. Articles of Incorporation

Corporations Code § 9300 (repealed)

9300. The articles of incorporation shall set forth:

- (a) The name of the corporation.
- (b) The specific and primary purposes for which it is formed.

This requirement shall not be deemed to preclude a statement of general purposes or powers or to restrict the right of the corporation to engage in any other lawful activity.

(c) That the corporation is organized pursuant to the General Nonprofit Corporation Law or pursuant to Part 1 of Division 2 of Title 1 of the Corporations Code.

(d) The county in this state where the principal office for the transaction of business of the corporation is located.

(e) The names and addresses of three or more persons who are to act in the capacity of directors until the selection of their successors. These persons may be given such titles as are deemed appropriate, but they shall be subject to all laws of this state relating to directors except as otherwise provided in this part. The number of persons so named constitutes the number of directors of the corporation, until changed by an amendment to the articles or, unless the articles otherwise provide, by a bylaw adopted by the members. However, the articles or, unless the articles provide otherwise, a bylaw duly adopted by the members, may state that the number of directors shall be not less than a stated minimum (which in no case shall be less than five) nor more

than a stated maximum (which in no case shall exceed such stated minimum by more than three); and in the event that the articles or bylaws permit such an indefinite number of directors, the exact number of directors shall be fixed, within the limits specified in the articles or bylaws, by a bylaw or amendment thereof duly adopted by the members or by the board of directors. In the event the articles provide for an indefinite number of directors, unless the articles provide otherwise, such indefinite number may be changed, or a definite number fixed without provision for an indefinite number, by a bylaw duly adopted by the members.

(f) If an existing unincorporated association is being incorporated, the name of the existing unincorporated association.

Comment. Section 9300 is superseded by Section 5250. Subdivision (a) is continued in Section 5250(a). Subdivision (b) is superseded by Section 5250(b). Subdivision (c) is continued in Section 5252(b). Subdivision (d) is not continued. Portions of the first two sentences of subdivision (e) are continued in Section 5250 (required contents of articles); the remainder of subdivision (e) is continued in Sections 5311-5313 (directors). Subdivision (f) is continued in Section 5213.

101/144

Corp. Code § 9301

Tentatively Approved
February 1976Corporations Code § 9301 (repealed)

9301. The authorized number and qualifications of members of the corporation, the different classes of membership, if any, the property, voting, and other rights and privileges of members, and their liability

to dues or assessments and the method of collection thereof, shall be set forth either in the articles or in the by-laws, which shall not, however, provide for the issuance of more than one membership to any member.

If the voting, property or other rights or interests, or any of them, be unequal, the articles or by-laws shall set forth the rule or rules by which the respective voting, property or other rights or interests of each member or class of members are fixed and determined.

The articles or by-laws may authorize dues or assessments or both to be levied upon all members or classes of membership alike, or in different amounts or proportions or upon a different basis upon different members or classes of membership and may exempt some members or classes of membership from either dues or assessments or both.

The articles or by-laws may fix the amount and method of collection of dues or assessments or both, or may authorize the board of directors to fix the amount thereof from time to time, and make them payable at such times or intervals, and upon such notice, and by such methods as the directors may prescribe. Dues or assessments or both may be made enforceable by action or by the sale or forfeiture of membership, or both, upon reasonable notice.

Comment. The first two sentences of former Section 9301 are continued in Section 5261 with the exception of the proviso relating to more than one membership, which is superseded by Section 5400. The third and fourth sentences are continued in Section 5510.

406/119

Corp. Code § 9302

Staff Draft May 1976

Corporations Code § 9302 (repealed)

9302. The articles or by-laws may provide for the number and tenure of office of the directors and may specify their powers, duties, compensation, and the manner in which they shall be chosen and removed from office.

Comment. Former Section 9302 is continued in Section 5265.

404/124

Corp. Code § 9303

Tentatively Approved
March 1976

Corporations Code § 9303 (repealed)

9303. The articles of incorporation may state any desired provision for the regulation of the affairs of the corporation in a manner not in conflict with law, including any restrictions authorized by Article 2, Chapter 1, Part 8, Division 1, Title 1 of this code upon the power to amend the articles of incorporation.

Comment. Former Section 9303 is superseded by Sections 5251 and 5920.

Tentatively Approved
February 1976

Corporations Code § 9304 (repealed)

9304. (a) Except in the case of the incorporation of an unincorporated association provided for in subdivision (b) hereof, each person named in the articles to act in the capacity of a first director shall, and any other person desiring to associate with those persons in the formation of the corporation may, personally sign the articles of incorporation. All signatures thereto shall be personally acknowledged before an officer designated by the laws of this State as one before whom an acknowledgment may be made. Any certificate of acknowledgment taken without the State shall be authenticated by the certificate of an officer having the requisite official knowledge of the qualification of the officer before whom the acknowledgment was made when taken before any officer other than a notary public or a judge or clerk of a court of record having an official seal.

(b) In the case of the incorporation of an unincorporated association, the articles of incorporation shall be subscribed and execution thereof personally acknowledged before an officer authorized to take acknowledgments by the presiding officer or acting presiding officer and the secretary or clerk or similar officer of the association or by at least a majority of its governing board or body, and there shall be attached thereto the affidavit of the subscribing officers, board or body that the association has duly authorized its incorporation and has authorized said officers, board or body to execute the articles of incorporation.

Comment. The first sentence of subdivision (a) of former Section 9304 is superseded by Section 5221; the second and third sentences are not continued. Subdivision (b) is continued in Section 5213 with the exception of the acknowledgment requirement which is not continued.

992/932

Corp. Code § 9304.5

Tentatively Approved
February 1976

Corporations Code § 9304.5 (repealed)

9304.5. If the articles conform to law, the Secretary of State shall file them in his office and shall endorse the date of filing thereon. The corporate existence begins upon the filing of the articles and continues perpetually unless otherwise expressly provided by law.

A copy of the articles certified by the Secretary of State and bearing the endorsement of the date of filing in this office shall be filed in the office of the county clerk of the county in which the corporation is to have its principal office and in the office of the county clerk of each county in which the corporation acquires ownership of any real property.

Comment. The first sentence of former Section 9304.5 is continued in Section 5120. The second sentence is continued in Section 5222. The third sentence is not continued.

368/253

Corp. Code § 9305

Tentatively Approved
March 1976

Corporations Code § 9305 (repealed)

9305. Articles of incorporation of nonprofit corporations shall be amended in the same manner as provided in Title 1, Division 1, Part 8, Chapter 1 of this code.

Comment. Former Section 9305 is superseded by Chapter 9 (commencing with Section 5910) of Division 2.

368/254

Corp. Code § 9306

Tentatively Approved
March 1976

Corporations Code § 9306 (repealed)

9306. Any nonprofit cooperative corporation formed under former Title 22, Part 4, Division 1, of the Civil Code may amend its articles to provide that the voting power, property rights, and interests of its members shall be equal or unequal, and if unequal, to set forth a general rule by which the voting power and property rights and interests of each member shall be determined and fixed.

Comment. Former Section 9306 is not continued. Any nonprofit cooperative corporation formed under former Title 22, Part 4, Division 1, of the Civil Code is "deemed organized and existing under and by virtue of the general corporation law of the State of California." Cal. Stats. 1931, Ch. 869, § 1, at 1840. The General Corporation Law permits the amendments referred to. Section 900.

Article 3. BylawsCorporations Code § 9400 (repealed)

9400. Bylaws may be adopted, amended or repealed by any of the following:

(a) By the written consent of members entitled to exercise a majority of the voting power, or by the vote of a majority of a quorum at a meeting of members duly called for the purpose according to the articles or bylaws.

(b) Except as provided in subdivision (c), by the board of directors, subject to the power of the members to change or repeal the bylaws.

(c) A bylaw or bylaw amendment fixing or changing the authorized number of directors may be adopted only by the members and may not be adopted by the board of directors except where the articles or bylaws provide for an indefinite number of directors pursuant to subdivision (e) of Section 9300.

However, the articles or bylaws may require the vote or written consent of members entitled to exercise a greater fraction or percentage of the voting power for the amendment or repeal of bylaws generally, or of particular bylaws, or for the adoption of new bylaws than would otherwise be required under this section. The articles or a bylaw adopted by the members may limit or restrict the power of the directors to adopt, amend, or repeal bylaws, or may deprive them of the power.

Comment. Subdivisions (a) and (b) of former Section 9400 are continued in Section 5260(a). Subdivision (c) is continued in Section 5311(c). The last paragraph is continued in Section 5260(b).

Tentatively Approved
April 1976

Staff Revision May 1976

Corporations Code § 9401 (repealed)

9401. The by-laws of a nonprofit corporation may make provisions

for:

(a) The time, place, and manner of calling, giving notice of, and conducting regular and special meetings of members or directors, which may be held outside the State. The by-laws may dispense with notice of all regular members' and directors' meetings.

(b) The requirements of a quorum of directors or members, which may be greater or less than a majority.

(c) Subject to any provisions in the articles, the number, time and manner of choosing, qualifications, terms of office, official designations, powers, duties, and compensation of the directors and other officers.

(d) The appointment and authority of executive or other committees of the board of directors.

Comment. The portion of the first sentence of subdivision (a) of former Section 9401 that permitted the bylaws to make provisions for meetings of members and directors is continued in Section 5264(a). The portion permitting meetings to be held outside the state is continued in Sections 5610 (members' meetings) and 5336 (directors' meetings). The second sentence of subdivision (a) is continued in Sections 5620 (members' meetings) and 5332 (directors' meetings).

Subdivision (b) is continued in Section 5264(b).

Subdivision (c) is continued in Section 5265(a).

Subdivision (d) is continued in Section 5265(b).

Tentatively Approved
February 1976

Corporations Code § 9402 (repealed)

9402. The by-laws of a nonprofit corporation may make provisions for:

(a) The admission, election, appointment, withdrawal, suspension, and expulsion of members.

(b) The qualifications of members and different classes of memberships, and the property, voting, and other rights, interests, or privileges, or any of them, of members or classes of members.

(c) The transfer, forfeiture, and termination of membership, and whether the property interest of members shall cease at their death or the termination of membership, and the mode of ascertaining the property interest, if any, at death or the termination of membership.

(d) The manner of voting by members and whether cumulative voting and proxy voting shall be allowed.

(e) The making of annual reports and financial statements to the members.

Comment. Subdivision (a) of former Section 9402 is continued in Section 5262(a). Subdivision (b) is superseded by Section 5261. Subdivision (c) is continued in Section 5262(b). Subdivision (d) is continued in Section 5263(a).

Note. The staff has not yet disposed of subdivision (e).

101/146

Corp. Code § 9403

Tentatively Approved
February 1976

Corporations Code § 9403 (repealed)

9403. The by-laws of a nonprofit corporation may make provisions for fees of admission and transfer fees, and, subject to any provisions in the articles, may provide pursuant to Section 9301 for dues and assessments to be paid by members or different classes of members and the methods of collection thereof.

Comment. The portion of former Section 9403 relating to fees of admission and transfer is continued in Section 5262(c). The portion relating to dues and assessments is continued in Sections 5261(d), 5410, and 5510.

406/121

Corp. Code § 9404

Staff Draft May 1976

Corporations Code § 9404 (repealed)

9404. All by-laws shall be recorded in a book which shall be kept in the principal office of the corporation.

Comment. Former Section 9404 is superseded by Section 5266.

(e) Convey, exchange, lease, mortgage, encumber, transfer upon trust, or otherwise dispose of all property, real or personal.

(f) Borrow money, contract debts, and issue bonds, notes, and debentures, and secure the payment or performance of its obligations.

(g) Pay the reasonable value of services rendered in this state to the nonprofit corporation before January 1, 1975, and not previously paid, by any person who performed such services on a full-time basis under the direction of a religious organization in connection with the religious tenets of the organization. Such person shall have relied solely on the religious organization for his or her financial support for a minimum of five years. A payment shall not be made if such person or religious organization waives the payment or receipt of compensation for such services in writing. Payment may be made to such religious organization to reimburse it for maintenance of any person who rendered such services and to assist it in providing future support and maintenance; however, payment shall not be made from any funds or assets acquired with funds donated by or traceable to gifts made to the nonprofit corporation by any person, organization or governmental agency other than the members, immediate families of members and affiliated religious organizations of the religious organization under whose direction the services were performed.

(h) Do all other acts necessary or expedient for the administration of the affairs and attainment of the purposes of the corporation.

Comment. Former Section 9501 is superseded by Section 5230. The provisions of former Section 9501 are continued in Section 5230 with the exception of subdivision (g) which has not been continued since it is special legislation having only a retroactive effect. See I. H. Ballantine & G. Sterling, California Corporation Laws 788.10 n.42 (4th ed. 1975).

Corporations Code § 9501.1 (repealed)

9501.1. Every nonprofit corporation, during any period or periods such corporation is deemed to be a "private foundation" as defined in Section 509 of the Internal Revenue Code of 1954 as amended by Section 101 of the Tax Reform Act of 1969 (all references in this section to the Internal Revenue Code shall refer to such code as amended by such act), shall distribute its income for each taxable year (and principal, if necessary) at such time and in such manner as not to subject such corporation to tax under Section 4942 of such code (as modified by paragraph (3) of subsection (1) of Section 101 of the Tax Reform Act of 1969), and such corporation shall not engage in any act of self-dealing as defined in subsection (d) of Section 4941 of such code (as modified by paragraph (2) of subsection (1) of Section 101 of the Tax Reform Act of 1969), retain any excess business holdings as defined in subsection (c) of Section 4943 of such code, make any investments in such manner as to subject such corporation to tax under Section 4944 of such code, or make any taxable expenditure as defined in subsection (d) of Section 4945 of such code (as modified by paragraph (5) of subsection (1) of Section 101 of the Tax Reform Act of 1969).

This section shall apply to any such corporation and any provision contained in its articles of incorporation or other governing instrument inconsistent with this section or to the contrary thereof shall be without effect.

Comment. Former Section 9501.1 is continued in Section 5563.

406/123

Corp. Code § 9502

Staff Draft May 1976

Corporations Code § 9502 (repealed)

9502. Unless otherwise provided in the articles or by-laws, any vacancy in the board of directors caused by death, resignation, or any disability shall be filled by a majority of the remaining members thereof, though less than a quorum.

Comment. Former Section 9502 is continued in Section 5326(a).

406/124

Corp. Code § 9503

Staff Draft May 1976

Corporations Code § 9503 (repealed)

9503. Subject to any provisions of the articles or by-laws, meetings of directors of nonprofit corporations shall be called and held as may be ordered by the directors.

Comment. Former Section 9503 is continued in Sections 5330 (bylaws and control) and 5331 (call of meetings).

406/125

Corp. Code § 9503.1

Corporations Code § 9503.1 (repealed)

9503.1. If the articles of incorporation or bylaws so provide, any action required or permitted to be taken by the board of directors under any provision of this division may be taken without a meeting, if all

members of the board shall individually or collectively consent in writing to such action. Such written consent or consents shall be filed with the minutes of the proceedings of the board. Such action by written consent shall have the same force and effect as a unanimous vote of such directors. Any certificate or other document filed under any provision of this division which relates to action so taken shall state that the action was taken by unanimous written consent of the board of directors without a meeting, and that the articles of incorporation or bylaws, as the case may be, authorize the directors to so act, and such statement shall be prima facie evidence of such authority.

Comment. Former Section 9503.1 is continued in Section 5335 with the exception of the last sentence, which is not continued in order to eliminate needless complexity in the articles or bylaws.

406/126

Corp. Code § 9504

Staff Draft May 1976

Corporations Code § 9504 (repealed)

9504. Directors of a nonprofit corporation are not personally liable for the debts, liabilities, or obligations of the corporation.

Comment. Former Section 9504 is continued in Section 5314.

Not Approved; See Minutes
February 1976.

Corporations Code § 9505 (repealed)

9505. A nonprofit corporation which holds property subject to any public or charitable trust is subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purposes for which it is formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the noncompliance or departure.

Comment. Section 9505 is continued as Section 5520.

Note. This section is to be reviewed for coordination with the Uniform Supervision of Trustees for Charitable Purposes Act.

Tentatively Approved
April 1976

CHAPTER 4. MEMBERS

Corporations Code § 9600 (repealed)

9600. Subject to any provisions of the articles or by-laws, meetings of members of nonprofit corporations shall be called and held as may be ordered by the directors or by members holding not less than one-tenth of the voting power of members.

Comment. Former Section 9600 is continued in Section 5613.

Tentatively Approved
March 1976

Corporations Code § 9601 (repealed)

9601. Unless the articles or by-laws provide otherwise, every member of a nonprofit corporation is entitled to one vote and may vote or act by proxy. The manner of voting may be by ballot, mail, or any reasonable means provided in the articles or by-laws. No member may cumulate his votes unless the articles or by-laws so provide.

Comment. The portion of the first sentence of former Section 9601 providing one vote per member is continued in Section 5700(a); the portion authorizing proxy voting is continued in Section 5705. The second sentence is continued in Section 5700(b). The last sentence is superseded by Section 5703.

101/147

Corp. Code § 9602

Tentatively Approved
February 1976

Corporations Code § 9602 (repealed)

9602. A nonprofit corporation shall have such memberships or classes thereof as the articles or by-laws specify, but no member may hold more than one membership, and in the absence of any such classification of members there shall be deemed to be but one class. Unless the articles or by-laws set forth the rule or rules fixing the respective voting, property and other rights and interests of each member or class of members, the rights and interests of members shall be equal as to any right or interest not so fixed.

Comment. The substance of former Section 9602 is continued in Section 5401 with the exception of the prohibition of a member holding more than one membership, which is superseded by Section 5400.

101/148

Corp. Code § 9603

Tentatively Approved
February 1976

Corporations Code § 9603 (repealed)

9603. Where neither the articles nor by-laws of a nonprofit corporation provide for members thereof as such, and in any case in which any nonprofit corporation has, in fact, no members other than the persons constituting its board of directors, the persons for the time being constituting its governing body or board are, for the purpose of any

statutory provision or rule of law relating to nonprofit corporations, the members of the corporation and shall exercise all the rights and powers of members thereof.

Comment. The substance of former Section 9603 is continued in Section 5402.

992/931

Corp. Code § 9604

Tentatively Approved
February 1976

Corporations Code § 9604 (repealed)

9604. If an unincorporated association is incorporated under this part, the members of the association shall be members of the corporation so created, unless they file their dissent in writing with the secretary thereof.

Comment. Former Section 9604 is continued in Section 5213.

101/149

Corp. Code § 9605

Tentatively Approved
February 1976

Corporations Code § 9605 (repealed)

9605. If the members of a nonprofit corporation having a stated number of members are reduced below that number by death, withdrawal, or

otherwise, the corporation shall not be dissolved for that reason; but the surviving or continuing members, or member, may fill vacancies and continue the corporate existence, unless the articles or by-laws provide otherwise.

Comment. The substance of former Section 9605 is continued in Section 5403.

101/198

Corp. Code § 9606

Tentatively Approved
March 1976

Corporations Code § 9606 (repealed)

9606. Every nonprofit corporation shall keep a membership book containing the name and address of each member. Termination of any membership shall be recorded in the book, together with the date on which the membership ceased.

Comment. Section 9606 is superseded by subdivisions (c) and (d) of Sections 6510 and 6511. Section 9606 apparently contemplates a book in which entries will be entered by hand. In order that a person can examine the book and ascertain the current members, it is necessary to provide in the statute that the date of termination of memberships be entered in the book. The concept of a membership book is an obsolete one in modern times when data processing equipment or mechanical methods can be used to store and reproduce membership lists. Accordingly, the concept of the membership book is not continued in the new General Non-profit Corporation Law. Instead, Section 6511 adopts the provision of the General Corporation Law that the books and records (other than minutes) may be kept in written form or in any other form capable of

being converted into written form. Nothing in Section 6511 will prevent a nonprofit corporation from continuing to keep a membership book if it so desires. However, the book will need to contain the information required by subdivisions (c) and (d) of Section 6510.

101/134

Corp. Code § 9607

Tentatively Approved
February 1976

Corporations Code § 9607 (repealed)

9607. Membership in nonprofit corporations may be evidenced by certificates. A statement that the corporation is not one for profit shall be printed in clear type upon the face of each such certificate.

Comment. The substance of former Section 9607 is continued in Section 5405.

101/135

Corp. Code § 9608

Not Approved; See Minutes
February 1976

Corporations Code § 9608 (repealed)

9608. Memberships may be terminated in the manner provided in the articles or by-laws. Unless the articles, the by-laws, or the law under which the corporation was formed provide otherwise, all the rights of a

member in the corporation, or in its property, cease on death or other termination of his membership.

Comment. The substance of former Section 9608 is continued in Section 5406.

101/136

Corp. Code § 9609

Tentatively Approved
February 1976

Corporations Code § 9609 (repealed)

9609. No member may transfer his membership or any right arising therefrom, unless the articles or by-laws so provide.

Comment. The substance of former Section 9609 is continued in Section 5407.

101/137

Corp. Code § 9610

Tentatively Approved
February 1976

Corporations Code § 9610 (repealed)

9610. Members of a nonprofit corporation are not personally liable for the debts, liabilities, or obligations of the corporation.

Comment. The substance of former Section 9610 is continued in Section 5409.

Tentatively Approved
February 1976

Corporations Code § 9611 (repealed)

9611. Nonprofit corporations may levy dues or assessments or both upon their members pursuant to any provisions of their articles or by-laws authorizing the levy of dues or assessments.

Comment. The substance of former Section 9611 is continued in Section 5410.

406/128

Corp. Code § 9700

Staff Draft May 1976

CHAPTER 5. MERGER AND CONSOLIDATION

Corporations Code § 9700 (repealed)

9700. The provisions of the General Corporation Law contained in Article 1 (commencing with Section 4100) of Chapter 3 of Part 3 of Division 1 of this title, apply to mergers and consolidations of corporations formed under this part, except as to matters specifically otherwise provided for in this chapter.

Comment. Former Section 9700 is not continued. Chapter 11 (commencing with Section 6110) provides comprehensively for mergers and consolidations of nonprofit corporations. Accordingly, the General Corporation Law provisions are not incorporated by reference.

406/129

Corp. Code § 9701

Staff Draft May 1976

Corporations Code § 9701 (repealed)

9701. An agreement to merge or consolidate shall be approved by the members of each corporation. Where the members have equal voting rights, the agreement shall be approved by a resolution adopted by the vote of a majority of the members or be approved by the written consent of two-thirds of the members; or where the members have unequal voting rights, the agreement shall be approved by a resolution adopted by the vote of members entitled to exercise a majority of the voting power or be approved by the written consent of members entitled to exercise two-

thirds of the voting power. This section shall be applicable regardless of any limitations or restrictions on the voting power of any class or classes of membership.

Comment. Former Section 9701 is continued in Section 6121.

406/130

Corp. Code § 9702

Staff Draft May 1976

Corporations Code § 9702 (repealed)

9702. Where the members act by vote, such votes shall be cast at a meeting duly called upon notice of the time, place, and purpose thereof, duly given to each member at least 20 days prior to the date of the meeting, except that such notice may be waived as provided in Section 2209. Unless the notice is waived, there shall be mailed with such notice a statement of the general terms of the proposed agreement.

Comment. Former Section 9702 is continued by Section 6123.

405/382

Corp. Code § 9703

Staff Draft May 1976

Corporations Code § 9703 (repealed)

9703. The articles of incorporation may require the vote or written consent of a greater percentage or fraction of the members than

would otherwise be required under this chapter, in cases where the members have equal voting rights, or may require the vote or written consent of members entitled to exercise a greater percentage or fraction of the voting power than would otherwise be required under this chapter, in cases where the members have unequal voting rights. In no case may the articles prohibit any merger or consolidation authorized by this chapter or by Chapter 3 (commencing with Section 4100) of Part 8 of Division 1 of this title.

Comment. Former Section 9703 is continued by Section 6122.

Tentatively Approved
February 1976

CHAPTER 6. WINDING UP AND DISSOLUTION

Corporations Code § 9800 (repealed)

9800. A nonprofit corporation may dispose of all or substantially all of its assets, or may be wound up or dissolved, or both, in the same manner and with the same effect as a stock corporation, under the General Corporation Law, subject to the provisions of Section 9801.

Comment. Section 9800 is superseded by Chapters 10 (commencing with Section 6000)(sales of assets), 13 (commencing with Section 6810)(involuntary dissolution), 19 (commencing with Section 6910)(voluntary dissolution), and 20 (commencing with Section 7010)(general provisions relating to dissolution) of Division 2.

Tentatively Approved
February 1976

Corporations Code § 9801 (repealed)

9801. Upon the dissolution or winding up of a nonprofit corporation, after paying or adequately providing for the debts and obligations of the corporation, the directors or persons in charge of the liquidation shall divide any remaining assets among the members in accordance with their respective rights therein, or dispose of them in such other manner as may be provided in the articles, unless the corporation holds

its assets on any trust or is organized for a charitable purpose or purposes.

If the corporation holds its assets on trust, or is organized for a charitable purpose or purposes, the assets shall be disposed of in such manner as may be directed by decree of the superior court of the county in which the corporation has its principal office, upon petition therefor by the Attorney General or any person concerned in the liquidation, in proceedings to which the Attorney General is a party.

This section does not apply where the charter of an incorporated subordinate body is surrendered to, taken away, or revoked by the head or national body.

Comment. The portion of the first paragraph of former Section 9801 that related to payment or adequate provision for debts and obligations is continued in Section 7030. The portion of the first paragraph that related to distribution of assets to members or as otherwise provided in the articles is continued in Section 7032.

The second paragraph is continued in Section 7034. The last paragraph is continued in Section 5214.

404/127

Corp. Code § 9802

Tentatively Approved
February 1976

Corporations Code § 9802 (repealed)

9802. Whenever the charter of a subordinate body incorporated pursuant to this part is surrendered to, taken away, or revoked by the

head or national body granting it, the subordinate body shall dissolve. The subordinate body shall pay its debts and obligations or make adequate provision therefor. The subordinate body may collect obligations owed to it and may sell property which is not designed for the exclusive use of the organization. The subordinate body shall then deliver any remaining property or obligations owed to it and any remaining proceeds of the sale of property to the head or national body, to be disposed of in accordance with the laws of the head or national body.

Comment. Former Section 9802 is continued in Section 5214.